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A TREATISE

ON THE

EFFECT OF THE

CONTRACT OF SALE

ON THE

LEGAL RIGHTS OF PROPERTY AND POSSESSION

IN

GOODS, WARES, AND MERCHANDISE.

BY

LORD BLACKBURN.

From the Second English Edition.

BY

J. C. GRAHAM,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

PHILADELPHIA:
THE BLACKSTONE PUBLISHING COMPANY.

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A TREATISE

ON THE

EFFECT OF THE

CONTRACT OF SALE.

(1837)

C.2

INTRODUCTION TO THE SECOND EDITION.

In preparing, with Lord Blackburn's kind permission, a second edition of this work, I felt it important that the reader should be able to see at a glance what, in all material respects, were the words of the original text.

I have therefore endeavoured clearly to distinguish, by the use of brackets, wherever I have deem it necessary to do so, all new matter which has been introduced either by way of addition or alteration and for which I am alone responsible.

The whole of the Chapters on "Equitable Interests and Assignments," on "Damages," and on "Interest," are my own, as well as a considerable portion of that on "Conditions Precedent" and the "Remedies of the Parties."

I take, with pleasure, this opportunity of thanking my friends of the Middle Temple, Mr. A. V. Blumberg, and Mr. R. W. Wallace, for help kindly given me in the task of correcting the proof sheets. My thanks are also more particularly due to Mr. C. H. L. Neish, Mr. Lionel Goodrich, and Mr. F. H. Salusbury, for much general assistance, and especially to Mr. S. J. Fraser Macleod for much valuable criticism and assistance in the preparation of the Chapter on Equitable Interests and Assignments.

J. C. GRAHAM.

Temple, 1885.

INTRODUCTION TO THE FIRST EDITION.

It is often of much importance to determine whether a litigant has a legal property in the subject-matter of dispute or merely a right of action against a person. The form of the remedy very frequently depends upon the answer to this question; for instance, a plaintiff cannot maintain trover or trespass *de bonis asportatis*, unless he has a right to the possession of the goods which are the subject of the action; neither can a vendor of goods maintain an action of goods bargained and sold unless the property has been transferred to the purchaser. And not only may the technical forms of action depend upon this, but sometimes the substantial question itself turns upon it; if property is destroyed either by pure accident or by the wrongful act of a party who is unable to pay for it, the loss in general falls upon the owner of the property; and in cases of insolvency, a creditor who has a legal or equitable right to a thing has the full benefit of it, whilst one whose claim is only against the person of the debtor, can obtain no more than a proportion of the insolvent estate along with the other creditors. In such cases, therefore, it is commonly one of the most important inquiries whether the creditor has any right to some specific property or not.

It is the object of the following Treatise to investigate one branch of this important subject, viz., how the legal interest in moveable corporeal property is affected by a sale of it.

Railway shares, stock, &c., and those kinds of property that are not tangible are of a different nature, and so is the property in the materials on which contracts or documents of title are written, which, in general, is considered as attached to the writing on them. And the law regulating the property in ships in some degree differs from that affecting

other moveable property, but as the law respecting them has been treated of by Lord Tenterden, in his Treatise on Shipping, it is not intended to touch upon that subject.

But subject to these exceptions, the law is the same as regards all moveable property, whether it be live stock or dead, manufactured goods or raw material, in short, of everything capable of touch and not fixed to the soil. The object of this Treatise, as already stated, is to discuss how far the property in goods, is, by the law of England, affected by an agreement concerning the sale of them.

By the common law of England, no peculiar form is required to give validity to a contract or agreement. It is essential that there be a mutual assent of both parties as to what is agreed upon, and also (unless the agreement be by deed) that there be a consideration for the engagement of the parties, for if not, the agreement is merely honorary and not enforced by the law; but if these essential circumstances can be shown to exist the common law is satisfied. The agreement might, at common law, be enforced, if the mutual assent of the parties and the consideration could be proved by any evidence. But by statute law, no contract for the sale of any goods, wares, or merchandize for the price of 10*l.* or upwards shall be allowed to be good except there be evidence of a particular character. When this evidence exists the effect of the agreement is the same as it would have been at common law.

A contract concerning the sale of goods may be defined to be a mutual agreement between the owner of goods and another, that the property in the goods shall for some price or consideration be transferred to the other, at such a time and in such a manner as is then agreed. If the consideration to be given for the goods is not money, it might, perhaps in popular language, rather be called barter than sale, but the legal effect is the same in both cases.

Such an agreement may have different effects in law upon the ownership of the goods to which it relates. It may be an agreement perfectly binding on the parties so as to give either of them a remedy against the person and general estate of the other for any default in fulfilling his part of

the agreement, but having no effect on the property or right of possession in the goods, and giving the proposed purchaser neither the rights nor the liabilities of the proprietor; so that he has no preferable right to the goods themselves, nor any means of enforcing his demand against them more than any other creditor, and on the other hand he is not liable to any loss arising from the destruction or injury of the goods.

Such agreements are generally called "Executory Agreements."

Or it may be an agreement amounting to a bargain and sale of the goods, transferring to the purchaser the general property in the goods, and with it the rights and liabilities attached to property, so that the purchaser has a specific interest in the goods themselves, of which he may avail himself, independently of his remedy against the vendor on the contract, and on the other hand making him liable to the general risk of any loss befalling the goods. Such an agreement is sometimes called an executed sale, but it is more technically called "a bargain and sale of the goods." When goods are bargained and sold, the vendor, if unpaid, still retains certain rights over the goods until they are delivered.

Such being the outline of the law, there are different points which it will be convenient to treat of separately, viz.:—

1st, What is required to satisfy the provisions of the statute law, and render an agreement concerning the sale of goods capable of being enforced.

2ndly, What agreements amount to a bargain and sale, and what are but executory.

3rdly, What are the rights reserved to a vendor when the general property is transferred to the purchaser, but before it is delivered into his possession.

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*A TREATISE [*1]

ON THE

CONTRACT OF SALE,

ETC.

PART I.

OF THE SEVENTEENTH SECTION OF THE STATUTE OF FRAUDS.

CHAPTER I.

WHAT AGREEMENTS ARE WITHIN IT.

THE 17th section of 29 Car. 2, c. 3, made for the prevention of frauds and perjuries, commonly called the Statute of Frauds, is in the following words:—"And be it enacted, that from and after the "said four-and-twentieth day of June (A. D. 1677), no contract for "the sale of any goods, wares, or merchandizes, for the price of "10*l.* or upwards, shall be allowed to be good, except the buyer "shall accept part of the goods so sold, and actually receive the "same, or give something in earnest to bind the bargain, or in part "payment, or that some note or memorandum in writing of the said "bargain be made and signed by the parties to be charged by such "contract, or their agents thereunto lawfully authorized" (*a*).

*[Lord Blackburn, in the case of *Maddison* v. *Alderson* (*b*), [*2]

(*a*) [The fourth section enacts "That no action shall be brought to charge any "executor or administrator upon any special promise to answer damages out of "his own estate; or whereby to charge the defendant upon any special promise "to answer for the debt, default, or miscarriage of another person; or to charge "any person upon any agreement made upon consideration of marriage; or upon "any contract or sale of lands, tenements, or hereditaments, or any interest in "or concerning them; or upon any agreement that is not to be performed with-"in the space of one year from the making thereof; unless the agreement upon "which such action shall be brought, or some memorandum or note thereof, "shall be in writing, and signed by the party to be charged therewith, or some "other person thereunto by him lawfully authorised."]

(*b*) *Maddison* v. *Alderson*, 8 Ap. Ca. 488; 52 L. J. Q. B. 749. See also the judgment of Brett, L. J., in *Britain* v. *Rossiter*, in 1879, 11 Q. B. D. 127; 48 L. J. Q. B. 363.

in 1883, said, speaking of the effect of these sections, "I think it is "now finally settled that the true construction of the Statute of "Frauds, both the 4th and 17th sections, is not to render the con-"tracts within them void, still less illegal, but is to render the kind "of evidence required indispensable when it is sought to enforce "the contract" (*c*).]

This important enactment is applicable to every sale of tangible moveable property, though not to sales of shares in a company or other intangible property (*d*).

At one time a question was made whether public sales by auction were not excepted from its operation. In *Simon* v. *Motivos* (*e*), in 1766, Lord Mansfield thought that a sale by auction, from the publicity of its nature, was not within the mischief aimed at by the statute, namely, the temptation to commit frauds and perjuries; and the rest of the King's Bench seem to have agreed with him, but the case was decided upon another ground, as the requisites of the statute had in fact been complied with.

In *Hinde* v. *Whitehouse* (*f*), in 1806, Lord Ellenborough expressed a strong opinion that sales by auction were within the statute, and that the opinion expressed by *Simon* v. *Motivos* (*g*) was ill-founded, but it was not necessary to decide the point as the requisites of the statute were in that case also complied with.

[*3] In *Kenworthy* v. *Schofield* (*h*), in 1824, the point was *decided. In that case there was a sale by auction of goods above 10*l.* in value, and the requisites of the statute were not complied with. The King's Bench decided that the contract could not be enforced; this decision has always been acted upon (*i*).

It was an unsettled point whether the provisions of the Statute of Frauds were applicable to contracts for the sale of goods which were at the time of the contract not in a state capable of being delivered according to the provisions of the contract: a more recent statute has rendered the point no longer important, but it may be worth while to state the difficulty.

In *Towers* v. *Osborne* (*k*), in 1724, Pratt, C. J., decided that an agreement to make a chariot was not within the statute, which he said related only to contracts in which the seller was to deliver the goods immediately.

(*c*) [An agreement which was made verbally abroad, and was good there, cannot be enforced here if it comes within the Statute of Frauds, *Leroux* v. *Brown*, 12 C. B. 801, in 1852; 22 L. J. C. P. 1. But very considerable doubt was thrown on this case by Willes, J., in *Williams* v. *Wheeler*, 8 C. B. N. S. 299, in 1860.]

(*d*) *Humble* v. *Mitchell*, 11 A. & E. 205.

(*e*) *Simon* v. *Motivos*, W. Bl. 599; S. C. 3 Burr. 1921.

(*f*) *Hinde* v. *Whitehouse*, 7 East, 558.

(*g*) *Simon* v. *Motivos*, 7 East, 558.

(*h*) *Kenworthy* v. *Schofield*, 2 B. & C. 945.

(*i*) See also *Pierce* v. *Corf*, L. R. 9 Q. B. 210; 43 L. J. Q. B. 52.

(*k*) *Towers* v. *Osborne*, 1 Strange, 506.

In *Clayton* v. *Andrews* (*l*), in 1767, the King's Bench confirmed this case, and held that a contract to deliver wheat (then unthrashed) in a month from the time of the agreement was not within the statute.

In *Groves* v. *Buck* (*m*), in 1814, the King's Bench decided that an agreement to purchase a quantity of oak pins, not yet cut out of the slab, was not within the statute.

The principle of these cases, decided by great Judges, including Pratt, C. J., Lord Mansfield, and Lord Ellenborough, seems to have been either that the word bargain in the statute must be taken in the strict technical sense, so as to exclude all executory contracts not amounting to a bargain and sale, or else that, as the statute said the contract was to be good if the buyer "accepted and actually received," part of the goods, it could only be meant to apply to contracts where it was possible to accept and receive part of the goods. It is clear that the buyer could neither accept nor receive the *chariot before it was built, the corn before it was thrashed, [*4] or the oak pins before they were cut out.

On the other hand, in *Rondeau* v. *Wyatt* (*n*), in 1792, the Court of Common Pleas decided, after taking time to consider, that a contract to supply goods on board ship was within the statute, as it was a contract for a sale, though a future one; and in *Garbutt* v. *Watson* (*o*), in 1822, the King's Bench decided the same point where the goods were flour yet unground. In both these case the Court said that *Towers* v. *Osborne* (*p*) might, perhaps, be supported as being a contract, not for a sale, but for work, labour, and materials; but subsequently in *Atkinson* v. *Bell* (*q*) the King's Bench held that it was not so. In *Garbutt* v. *Watson* (*o*), *Clayton* v. *Andrews* (*r*), was expressly overruled.

In seems impossible to reconcile these decisions, but the legislature in 1828, by 9 Geo. 4, c. 14, s. 7 (Lord Tenterden's Act), has put an end to the difficulty by enacting, that "the provisions of the "Statute of Frauds shall extend to all contracts for the sale of goods "to the value of 10*l.* or upwards, notwithstanding the goods may "be intended to be delivered at some future time, or may not at the "time of such contract be actually made, procured, or provided, or "fit or ready for delivery, or some act may be requisite for the mak "ing or completing thereof, or rendering the same fit for delivery."

[In *Harman* v. *Reeve* (*s*), in 1856, Jervis, C. J., pointed out that in 9 Geo. 4 the word "value" was used, instead of the word "price," as in the 17th section, and that as the statutes must be construed

(*l*) *Clayton* v. *Andrews*, 4 Burr. 2101.
(*m*) *Groves* v. *Buck*, 3 M. & S. 178.
(*n*) *Rondeau v. Wyatt*, 2 H. Bl. 63.
(*o*) *Garbutt* v. *Watson*, 5 B. & A. 613.
(*p*) *Towers* v. *Osborne*, 1 Strange, 506.
(*q*) *Atkinson* v. *Bell*, 8 B. & C. 277.
(*r*) *Clayton* v. *Andrews*, 4 Burr. 2101.
(*s*) *Harman* v. *Reeve*, 18 C. B. 587 ; 25 L. J. C. P. 257.

together, the 17th section must now be read as if it contained the word "value."].

The statutes, therefore, are now applicable to all contracts for the [*5] sale of "goods, wares, and merchandize," words which, *as has been already said, comprehend all tangible moveable property; I say moveable property, for things attached to the soil are not goods, though when severed from it they are; thus, growing trees are a part of the land, but the cut logs are goods, and so too bricks or stones which are goods, cease to be so when built into a wall; they then become a part of the soil. Fixtures and those crops which are included amongst emblements, though attached to the soil are not for all purposes part of the freehold.

It seems pretty plain, upon principle, that an agreement to transfer the property in something that is attached to the soil at the time of the agreement, but which is to be severed from the soil and converted into goods before the property is to be transferred, is an agreement for the sale of goods within the meaning of the 9 Geo. 4, c. 14, if not of the 29 Car. 2, c. 3. The agreement is, that the thing shall be rendered into goods and then in that state sold; it is an executory agreement for the sale of goods, not existing in that capacity at the time of the contract. And when the agreement is, that the property is to be transferred before the thing is severed, it seems clear enough, that it is *not* a contract for the sale of goods, it is a contract for sale, but the thing to be sold is not goods. If this be the principle, the true subject of inquiry in each case, is, when do the parties intend that the property is to pass: if the things perish by inevitable accident before the severance, whom do they mean to bear the loss? for in general that is a good test of whether they intend the property to pass or not; in other words, if the contract be for the sale of the things after they have been severed from the land so as to become the subject of larceny at common law, it is, at least, since the 9 Geo. 4, c. 14, a contract for the sale of goods, wares, and merchandizes, within the 17th section of the Statute of Frauds. If the contract be for the sale of the things whilst they are attached to the soil and not the subject of larceny at common law, it is a contract for the sale of things, crops, fixtures, emblements, trees or minerals, which may or may not be an interest in land within the 4th section of the statute, but are not [*6] goods, wares, and merchandize *within the 17th section. On the whole the cases are very much in conformity with these distinctions, though there is some authority for saying that a sale of emblements or fixtures vesting an interest in them, whilst in that capacity, and before severance, is a sale of goods within the meaning of the 17th section of the Statute of Frauds, and a good deal of authority that such a sale is not a sale of an interest in land within the 4th section, which, however, may be the case though it is not a sale of goods, wares, and merchandize within the 17th.

In reviewing the authorities, it is of some importance to remark

how the question arose before the Court, and whether the decision turned upon the legal effect of the contract proved in evidence, or upon the contract stated in the pleadings, for some misapprehensions seem to have risen from neglecting this.

The first case that is generally cited on the subject was *Waddington* v. *Bristow* (*t*), decided by the Common Pleas in 1801. It was an action against executors. The declaration was that the defendant's testator was possessed of land on which hops were then growing; that the plaintiffs bargained for and agreed to buy, and the testator agreed to sell all the hops *then growing*, to be delivered in pockets, &c. In proof of this declaration a document was produced, signed by both parties, which was in the following terms:—"Agreed to give the undermentioned gentlemen at the "rate of 10*l.* per cwt. for the quantities of hops as attached to their "respective names, to be in pockets, and to be delivered at "Whitstable. Wm. Francis (the testator), about 23 acres." This paper was not stamped, and the question was not whether it came within the Statute of Frauds or not, but whether it came within the exemption in the Stamp Act of agreements relating to the sale of goods, wares, and merchandizes. Lord Alvanley thought it an agreement for the sale of goods, and something more, viz., an agreement not to sell the produce of the land to any one else before it was severed. Heath, J., and Rooke, J., *thought a con- [*7] tract for the sale of non-existing goods was not within the exemption, and that as in this case the hops did not at the time of the sale exist as goods, it required a stamp. Chambre, J., thought a contract for the sale of non-existing goods was within the exemption; he seems to have doubted whether the agreement proved was not within the exemption, but he agreed with Lord Alvanley that the agreement declared upon gave the purchaser an interest in the produce of the vendor's land. It seems probable that Chambre, J., would have held the agreement declared on within the 4th section of the Statute of Frauds, but it seems difficult to treat this case as directly deciding anything and Parke, B., in *Rodwell* v. *Phillips* (*u*), threw doubt on it.

In *Crosby* v. *Wadsworth* (*x*), in 1805, the action was trespass to the plaintiff's close, growing grass and hay. The plaintiff claimed the hay under a parol contract; Lord Ellenborough expressed an opinion that it could not be an agreement within the 17th section, because the goods did not exist as such at the time of the contract; on this opinion he afterwards acted in *Groves* v. *Buck* (*y*), and as has been already observed, it is now by Act of Parliament, not law, whatever it might be then. But the judgment of the Court was that an agreement conferring an exclusive right to the growing

(*t*) *Waddington* v. *Bristow*, 2 B. & P. 452.
(*u*) *Rodwell* v. *Phillips*, 9 M. & W. 503.
(*x*) *Crosby* v. *Wadsworth*, 6 East, 602.
(*y*) *Groves* v. *Buck*, 3 M. & S. 178.

grass was an agreement for an interest in land. It may be observed that on these pleadings the effect of the agreement was not material; if the agreement did not give an exclusive right to the growing grass, trespass would not lie; if it did the statute applied: in either case the plaintiff failed (*z*).

In *Scorell* v. *Boxall* (*a*), in 1827, on similar pleadings, the Exchequer decided the same point the same way, where the subject matter of the action was growing underwood.

In both those cases the Court had to decide upon the contract [*8] *as it was stated on the pleadings; but in many cases the question depends as to the legal effect of the contract proved. [And it becomes necessary to examine into the state in which the subject matter of the sale is, or will be, at the time when the property is intended to pass.] In general, when there is a contract for the sale of goods in a state not yet fit for delivery, it is considered that the property is not intended to be transferred to the purchaser until the seller has done all that he is bound to do to render the goods fit for delivery, unless a contrary intention clearly appear (*post*, page 174), and this rule must apply where the contract is for the sale of things not yet rendered into goods, but which are, if the agreement is pursued, to be rendered into goods. The intention of the parties must be presumed to be to transfer the property in the things when in a deliverable state, *i. e.*, when severed from the soil, if that [the severing] is to be done by the seller, and not before. There is no doubt on the authorities that such a contract, continuing executory till the subject matter of the sale is converted into goods, is (now at least) a contract concerning the sale of goods, and not a contract for the sale of an interest in land.

Thus, in *Smith* v. *Surman* (*b*), in 1829, the King's Bench held that a verbal agreement for the sale of timber then growing, and to be cut by the vendor, was a contract for the sale of goods within the meaning of the 17th section. Littledale, J., said, in delivering judgment, "The impression on my mind is that wherever the subject matter at the time of the completion of the contract is goods, "wares, and merchandizes, the 17th section attaches upon it, "although it has become goods, wares, and merchandize between "the time of making and completing the contract, either by one of "the parties having bestowed his work and labour upon his own "materials, or by his having converted a portion of his freehold "into goods and chattels." In that case the timber was to be cut [*9] by the *vendors*. [In *Watts* v. *Friend* (*c*), in 1830, *the plaintiff agreed to supply the defendant with turnip seed: the defendant was to sow it on his own land, and to sell the seed produced to the plaintiff at a guinea a bushel. There turned out to be more

(*z*) *Carrington* v. *Roots*, in 1837, 2 M. & W. 248.
(*a*) *Scorell* v. *Boxall*, 1 Y. & J. 396.
(*b*) *Smith* v. *Surman*, 9 B. & C. 561. See also *Teal* v. *Auty*, 2 Brod. & B. 101.
(*c*) *Watts* v. *Friend*, 10 B. & C. 446.

than 10*l.* worth of seed. The King's Bench held that this contract was within the 17th section.] In *Sainsbury* v. *Matthews* (*d*), in 1838, the Exchequer held that a contract for the sale of potatoes not yet at maturity, at so much per sack, to be dug by the purchaser, was not a contract passing any immediate interest at all, but a contract for the sale of goods at a future day. Parke, B., said, "The contract gives no right to the land; if a tempest had "destroyed the crop in the meantime, and there had been none to "deliver, the loss would clearly have fallen upon the defendant" "(the vendor). "It is only a contract for goods to be sold and delivered." [The contract was for the sale of things which were not goods at the time of the contract, but were to be made so before the contract attached upon them and the property passed.] The terms of the agreement by which the price was to depend on the number of sacks seem to be in this case important, and to make the distinction between it and the following cases :—

In *Parker* v. *Staniland* (*e*), in 1809, the bargain was for the crop of potatoes in the ground in November, and the purchaser was to take them immediately; instead of taking them immediately, he dug and removed them at intervals, taking the last about Lady Day, by which time they were damaged by the frost. The purchaser paid for all the potatoes he had taken away, but refused to dig up or take away the potatoes in a part of the field where they were destroyed by frost. The vendor recovered a verdict for their price. No question could arise upon the 17th section, for there was both a part payment and a part acceptance and receipt, but a rule nisi for a non-suit was granted on the ground that the bargain was for an interest in land; no point seems to have *been [*10] made about the risk of loss, perhaps because it was considered a clear thing that the damage arose from the gross negligence of the purchaser, who should have dug them up before the winter. An objection to the form of action, which would probably have raised the same point in another shape, was overruled, because not taken at the trial. But though the fact of the point not being made may weaken the authority of the case, it seems that Lord Ellenborough did consider that the contract gave the purchaser property in the potatoes whilst yet unsevered from the soil, and that a property in them was not an interest in land, "though," said he, "they were "not in the shape of personal chattels, as not being severed from "the land, so that larceny might be committed of them."

In the very same week, June 6th, 1809, the Common Pleas, in *Emmerson* v. *Heelis* (*f*), decided the reverse. In that case there was a sale by auction of a growing crop of turnips, to be dug by the purchaser, for a price less than 10*l.*, so that no question could arise upon the 17th section. There seems to have been no express

(*d*) *Sainsbury* v. *Matthews*, 4 M. & W. 343; 7 Dowl. 23.
(*e*) *Parker* v. *Staniland*, 11 East, 365.
(*f*) *Emmerson* v. *Heelis*, 2 Taunt. 38.

agreement as to when they were to be removed, but in other respects, the contract seems identical with that in *Parker* v. *Staniland* (*g*). The vendor brought an action against the purchaser for not taking these turnips away. On behalf of the defendant several objections were made, which were satisfactorily answered; but a great one was, that it was a contract for an interest in land, and that the only memorandum was that made by the auctioneer at the sale, and that the signature of the auctioneer would not bind the purchaser. The Court, after argument and taking time to consider, decided that it was an interest in land, but that the signature of the auctioneer was binding. From the expressions used, it appears that the Court thought the purchaser took an interest in the turnips whilst yet in the soil, and that it never occurred to them that there could be any [*11] difference between growing turnips which are *emblements, and hops and growing timber, both of which were instanced by the Court.

In *Rodwell* v. *Phillips* (*h*), in 1842, the Exchequer thought that the following agreement: "Thomas Phillips agrees to sell to Mr. "Rodwell the crops of fruit and vegetables of the upper portion of "the garden, from the large pear trees, for the sum of 30*l.*, and "Lionel Rodwell agrees to buy the same at the aforesaid price, "and has paid 1*l.* deposit," gave the purchaser an interest in the fruit before severance [and was an interest in land], and consequently required a stamp. [The purchaser was to gather the fruit. Lord Abinger, C. B., pointed out in his judgment that growing fruit would not pass to an executor but to the heir.] The pears, in this case, were not emblements nor fixtures, but part of the freehold.

The distinction between these cases, in which the property in the things was held to pass before they were severed from the soil, and *Sainsbury* v. *Matthews* (*i*), is precisely the same as that between an ordinary bargain and sale, and the case of *Simmons* v. *Swift* (*k*).

As the parties may enter in fact into a contract giving an interest in crops whilst still unsevered, it is desirable to inquire whether such a contract is within either the 4th or 17th sections of the Statute of Frauds. It is to be observed that emblements (*l*) are not part of the freehold or inheritance: they go to the executor, and not to the heir; they may be seized by the sheriff under a fi. fa., and are certainly chattels, but they are not *goods*, but are so far a part of the soil that larceny at common law could not be committed on them. A contract, then, for the sale of growing crops as such is a contract for the sale of an interest in something that is a part of the soil, though not a part of the inheritance, and whether

(*g*) *Parker* v. *Staniland*, 11 East, 365.
(*h*) *Rodwell* v. *Phillips*, 9 M. & W. 501.
(*i*) *Sainsbury* v. *Matthews*, 4 M. & W. 343; 7 Dowl. 23.
(*k*) *Simmons* v. *Swift*, 5 B. & C. 857.
(*l*) As to what are emblements, see *Graves* v. *Weld*, 5 B. & Ad. 105. Speaking generally, they are such crops as are gathered annually.

such an interest is within the meaning of the 4th section of the Statute of Frauds or not, depends on the sense in which *the [*12] words "lands, tenements, and hereditaments," are there used.

In *Warwick* v. *Bruce* (*m*), in 1813, in which the contract declared on was a contract for the sale of all the potatoes *then* growing on certain lands, Lord Ellenborough overruled an objection that the contract was within the 4th section of the Statute of Frauds. "If," said he, "this had been a contract conferring an exclusive right to "the land for a time, for the purpose of making a profit of its "growing surface, it would be a contract for the sale of an interest "in land. But here it is a contract for the sale of potatoes at so "much an acre. The potatoes are the subject matter of sale, and "whether at the time of the sale they were covered with earth in "the field or in a box, still it was a sale of a mere chattel." It seems pretty clear that Lord Ellenborough thought that growing crops were not part of the land within the 4th section, though he certainly never intimates an opinion that they were goods in any sense of the word before severance.

In *Evans* v. *Roberts* (*n*), in 1826, the agreement was for the sale of a cover of potatoes, to be turned up by the vendor at the price of 5*l.* No question would arise under the 17th section, as the price was below 10*l.*; but it was objected that it was a contract for the sale of an interest in land. Holroyd, J., pointed out that the purchaser was to have nothing to do with the potatoes till they were raised; and, moreover, that the vendor might choose which cover the purchaser was to have, so that he could have no interest in any specific land; but though both these propositions seem pretty clear, and either of them would have disposed of the case, Bayley, J., and Littledale, J., took the opportunity of giving their opinions on the law at some length. Bayley, J., held that emblements and fixtures were not land within the 4th section, and expressly dissented from the opinion in *Emmerson* v. *Heelis* (*o*), which he treated as a dictum not necessary for *the decision [*13] of the case (*p*). Littledale, J., at some length gave an opinion that land in the 4th section "meant land taken as mere land, and not its annual growing productions." This opinion is in accordance with what appears to have been Lord Ellenborough's; but Bayley, J., went further, and stated that growing crops were mere goods, and might be recovered under a count for goods bargained and sold, and he stated less distinctly, that a contract for the sale of them was within the 17th section. These two last propositions

(*m*) *Warwick* v. *Bruce*, 2 M. & S. 205.

(*n*) *Evans* v. *Roberts*, 5 B. & C. 829.

(*o*) *Emmerson* v. *Heelis*, 2 Taunt. 38, *ante*, p. 10.

(*p*) This was a misapprehension of the learned judge, as it was a necessary point to be decided before the point on which the judgment was given could arise; indeed, the whole of this judgment of Bayley, J., is open to his own observation, it was not much considered, for it was unnecessary to the decision of the case then before the Court.

seem, however, exceedingly questionable, and no authority is given for either. In *Mayfield* v. *Wadsley* (*q*), an outgoing tenant was allowed to keep a verdict on a count for crops bargained and sold, which he had obtained against the incoming tenant, who had agreed to take them at a valuation; and in *Hallen* v. *Runder* (*r*), in 1834, the Exchequer held that counts for fixtures, bargained and sold, were sufficient. But in the latter case it was expressly decided, that an agreement for the sale of fixtures between the landlord and the outgoing tenant was not a sale of *goods*, either within the Statute of Frauds or the meaning of a count for goods sold and delivered (*s*). It may be observed, that in both these cases the land was to pass to the purchaser, and the agreement was rather an abandonment of the vendor's right to diminish the value of the land, than a sale of anything; but it seems difficult to make that consistent with the opinion of Bayley, J., in *Evans* v. *Roberts* (*t*): if a contract for a sale of crops or fixtures to one who takes the soil is only an abandonment of a right to sever them, it seems to follow that a sale of them in their unsevered state to one who does *not* take the soil, is only a transfer of the right to sever them.

[*14] *The next case on the subject is *Jones* v. *Flint* (*u*), in 1839. There crops were sold by parol, and it was agreed that the vendor's cattle should run with the purchaser's in the after-grass. There had been part payment. The declaration was for crops bargained, sold and carried away. The Court held, that it was clear that the crops were not an interest in land, and they considered the agreement about the after-grass to amount to an agreement that the purchaser's cattle should eat the vendor's grass: not that the grass should become the purchaser's and the vendors cattle it. They held, therefore, that there was no contract for the sale of an interest in land within the 4th section. No question arose about its being a sale of goods within the 17th section, as the part payment put an end to any objection upon that ground (*x*).

[The last case on the question whether the contract gives an interest in land within the meaning of the 4th section is *Marshall* v. *Green* (*y*), in 1875, where most of the authorities were considered, and Brett, J., laid down certain tests based upon Sir E. V. Williams's note to *Duppa* v. *Mayo*, in the last edition of Williams' Saunders, p. 395. He said, "That note gives certain tests as applicable to particular cases. Where the subject matter of the "contract is growing in the land at the time of the sale, then if "by the contract the thing sold is to be delivered at once by the

(*q*) *Mayfield* v. *Wadsley*, 3 B. & C. 357.
(*r*) *Hallen* v. *Runder*, 1 C., M. & R. 267.
(*s*) This case was followed in *Lee* v. *Gaskell*, in 1876, 1 Q. B. D. 700; 45 L. J. Q. B. 540.
(*t*) *Evans* v. *Roberts*, 5 B. & C. 829.
(*u*) *Jones* v. *Flint*, 10 A. & E. 754.
(*x*) *Washbourn* v. *Burrows*, in 1874, 1 Ex. 107; 16 L. J. Ex. 266.
(*y*) *Marshall* v. *Green*, 1 C. P. D. 35; 45 L. J. C. P. 153.

"seller the case is not within the section (4th). Another case is "where, although the thing may have to remain in the ground some "time, it is to be delivered by the seller finally, and the purchaser is to "have nothing to do with it until it is severed, and that case also is "not within the section. Then there comes the class of cases where "the purchaser is to take the thing away himself. In such a case "where the things are *fructus industriales*, then, although they are "still to derive benefit from the land after * the sale in order [*15] "to become fit for delivery, nevertheless it is merely a sale of goods, "and not within the section. If they are not *fructus industriales*, "then the question seems to be whether it can be gathered from "the contract that they are intended to remain in the land for the "advantage of the purchaser, and are to derive benefit from so re-"maining; then part of the subject matter of the contract is the "interest in land, and the case is within the section. But if the "thing, not being *fructus industriales*, is to be delivered immedi-"ately, whether the seller is to deliver it or the buyer is to enter and "take it himself, then the buyer is to derive no benefit from the "land, and consequently the contract is not for an interest in the "land, but relates solely to the thing sold itself."

In the cases in the note (*z*) the question was whether that which had been contracted for was goods, or work and labour. The importance of this is very much less now than it was when strict forms of pleading were in use.]

(*z*) *Atkinson* v. *Bell*, in 1828, 8 B. & C. 277; *Grafton* v. *Armitage*, in 1845, 2 C. B. 336; 15 L. J. C. P. 20; *Clark* v. *Bulmer*, in 1843, 11 M. & W. 243; *Clay* v. *Yates*, in 1856, 1 H. & N. 73; 25 L. J. Ex. 237; *Lee* v. *Griffin*, in 1861, 30 L. J. Q. B. 252; 1 B. & S. 272.

[*16]

*CHAPTER II.

OF THE FIRST EXCEPTION.

SECTION I.

What constitutes an acceptance, p. *17.

SECTION II.

And an actual receipt, p. *25.

HAVING considered what contracts are within the 17th section of the Statute of Frauds, it becomes necessary to inquire what circumstances will satisfy the statute. It will be observed, on looking at the language of the statute that there are three different modes pointed out in which the contract may be made good, and it is convenient to treat of each of the three ways separately. First, then, what is meant by the first exception, viz., "except the buyer shall "accept part of the goods so sold, and actually receive the same."

If we seek for the meaning of the enactment, judging merely from its words, and without reference to decisions, it seems that this provision is not complied with unless the two things concur: the buyer must accept, and he must actually receive part of the goods; and the contract will not be good unless he does both. And this is to be borne in mind, for as there may be an actual receipt without any acceptance, so may there be an acceptance without any receipt. In the absence of authority, and judging merely from the ordinary meaning of language, one would say that an acceptance of part of the goods is an assent by the buyer, meant to be final, that this part of the goods is to be taken by him as his property under the contract, and as so far satisfying the contract. So long as the buyer can, without self-contradiction, declare that the goods are not to be taken in fulfillment of the contract, he has not accepted them. And it is immaterial whether his refusal to take the goods be reasonable or not. If he refuses the goods assigning grounds false or friv- [*17] olous, *or assigning no reasons at all, it is still clear that he does not accept the goods, and the question is not whether he ought to accept, but whether he *has* accepted them. The question of acceptance or not is a question as to what was the intention of the buyer as signified by his outward acts.

The receipt of part of the goods is the taking possession of them. When the seller gives to the buyer the actual control of the goods, and the buyer accepts such control, he has actually received them. Such a receipt is often evidence of an acceptance, but it is not the same thing; indeed the receipt by the buyer may be, and often is, for the express purpose of seeing whether he will accept or not. If goods of a particular description are ordered to be sent by a carrier, the buyer must in every case receive the package to see whether it answers his order or not; it may even be reasonable to try part of the goods by using them; but though this is a very actual receipt, it is no acceptance so long as the buyer can consistently object to the goods as not answering his order. It follows from this that a receipt of goods by a carrier or on board ship, though a sufficient delivery to the purchaser, is not an acceptance by him so as to bind the contract, for the carrier, if he be an agent to receive, is clearly not one to accept the goods.

On the whole the cases are pretty consistent with these suggestions and with each other, as to what forms an acceptance within the statute, though not as to the strength of the proof required to establish it. On the question of what constitutes an actual receipt there is some difficulty in reconciling the cases, but we shall return to this part of the subject after citing a few cases to show what is an acceptance.

Section I.

What constitutes an acceptance.

In *Hinde* v. *Whitehouse* (*a*), in 1806, sugar was sold by auction under this, amongst other conditions:—"The sugars to be taken "with all faults and defects, as they now are at the *King's [*18] "weights and tares, with the *allowance of draft*, or reweighed "*giving up the draft*." Previously to the sale samples were drawn from each hogshead. It was proved that the samples used at such sales were always delivered to the purchasers as a part of their purchase to make up the quantity, and that in this particular case the samples had been delivered to and kept by the defendant, who was the highest bidder for sugar at a price above 10*l*. The defendant's counsel contended that the samples were accepted as specimens only and not as part of the goods sold, but the Court of King's Bench decided otherwise. Lord Ellenborough, in delivering judgment, said, "Inasmuch as the half pound sample of sugar "out of each hogshead in this case is, by the terms and conditions "of sale, so far treated as part of the entire bulk to be deliver-

(*a*) *Hinde* v. *Whitehouse*, 7 East, 558.

"ed, that it is considered in the original weighing as constituting a "part of the bulk actually weighed out to the buyer, and to be al-"lowed for specifically if he should choose to have the com-"modity re-weighed, I cannot but consider it as a part of the goods "sold under the terms of the sale, accepted, and actually received "as such by the buyer; and, although it be delivered partly *alio* "*intuitu*, namely, as a sample of quality, it does not therefore pre-"vent its operating to another consistent intent also in pursuance "of the purposes of the parties as expressed in the conditions of "sale, namely, as a part delivery of the thing itself *as soon as, in* "*virtue of the bargain*, the buyer should be entitled to retain, and "should retain it accordingly." There could be no question in that case that the buyer had actually received the samples, and it is difficult to give a more concise and accurate definition of the time when an actual receipt becomes an actual receipt and acceptance than is contained in the last few words above quoted.

[In *Morton* v. *Tibbett* (*b*), in 1850, where the defendant agreed to buy and to send for fifty quarters of wheat, the sale was by sample which he took away with him. He resold it by the same [*19] sample, and when the wheat arrived he tendered *it to his vendee, who refused to take it as it did not agree with the sample. The defendant then refused to accept it from the plaintiff. It was argued that there was no evidence of an acceptance to satisfy the statute. But the Court held that there was, and, inasmuch as Lord Campbell said that the defendant had done nothing to preclude himself from objecting that the wheat was not up to sample, he does not appear to have considered that tendering to the subvendee was evidence of acceptance, and if that be so, the only evidence was the accepting the sample (*c*). Lord Campbell, C. J., said (*d*), "We are therefore of opinion that there may be an acceptance and "receipt within the meaning of the Act, without the buyer having "examined the goods or done anything to preclude him from con-"tending that they do not correspond with the contract." And this opinion was confirmed by Lord Campbell, C. J., in *Parker* v. *Wallis* (*e*), in 1855, and by Bramwell, B., in *Castle* v. *Sworder* (*f*). The acceptance of the sample is a present actual acceptance, with the proviso that it may be returned if the bulk do not correspond with it.]

In *Phillips* v. *Bistolli* (*g*), in 1824, the sale was at an auction, one of the conditions being that the buyer was to pay 30*l.* per cent. upon being declared the highest bidder, and the residue before the goods were removed. The defendant had some earrings knocked down to him at 88*l.*: they were handed him; after three or four

(*b*) *Morton* v. *Tibbett*, 15 Q. B. 428; 19 L. J. Q. B. 382.
(*c*) See also *Gardner* v. *Grout*, 2 C. B. N. S. 340.
(*d*) 15 Q. B. 434.
(*e*) *Parker* v. *Wallis*, 5 E. & B. 21.
(*f*) *Castle* v. *Sworder*, 5 H. & N. 287.
(*g*) *Phillips* v. *Bistolli*, 2 B. & C. 511.

minutes he returned them, stating that he thought the bidding was 48*l.* The auctioneer brought an action for the price, and Abbott, C. J., told the jury that, if there was no mistake as to the bidding, there was in law an acceptance and actual receipt. The jury found there was no mistake, and a verdict was entered for the plaintiff. The Court of King's Bench granted a new trial, because the delivery of the earrings to the purchaser, *who had neither paid [*20] deposit nor price, was at most but very slight evidence that the vendor parted with the right of possession, and that the keeping of the goods for a few minutes was but slight evidence of an acceptance by him as owner; in short, they thought that the purchaser was not proved to be either, in the language of Lord Ellenborough above quoted "entitled in virtue of the bargain to retain," nor to have "retained accordingly." The two cases agree most accurately as to what must be proved, though it may be that Lord Ellenborough would have thought the evidence in *Phillips* v. *Bistolli* (*h*) sufficient, whilst, perhaps, the Judges of 1824 would have hesitated in *Hinde* v. *Whitehouse* (*i*).

In *Kent* v. *Huskisson* (*k*), in 1802, the facts seem all to have been truly stated in a letter from the defendant to the plaintiff: "After receiving a letter from your house in town, stating the bale "of sponge was sent by your directions, I called in a friend or two "who are competent judges of the article, and asked them to say, "according to the present price of sponge, what it was worth. The "answer was, not more than six shillings per pound: have there-"fore returned it to you by the same conveyance." There had been a verbal contract for the sale of more than 10*l.* worth of sponge at 11*s.* per pound. The Common Pleas were clear that these facts did not amount to an acceptance and receipt. Heath, J., observed, that the vendee, to bring the case within the words of the statute, must "both accept and receive. Now that acceptance "I cannot consider to be any other than the ultimate acceptance, "and such as completely affirms the contract." Chambre, J., said, "Certainly there was no acceptance of the goods by the defendant, "unless we can consider a refusal to accept as amounting to an acceptance." [The acceptance under the statute must be with the intention of taking possession as owner, as Parke, B., said in *Farina* v. *Home* (*l*).]

*In *Proctor* v. *Jones* (*m*), in 1826, it was held that the mark- [*21] ing by the vendor of casks of wine lying in the docks with the initials of the purchaser, at his request and in his presence, the terms of payment not having been settled at the time and consequently the contract not being complete, is not an acceptance under the 17th section of the Statute of Frauds.

(*h*) *Phillips* v. *Bistolli*, 2 B. & C. 511.
(*i*) *Hinde* v. *Whitehouse*, 7 East, 558.
(*k*) *Kent* v. *Huskisson*, 3 B. & P. 233.
(*l*) *Farina* v. *Home*, 16 M. & W. 123; 16 L. J. Ex. 73.
(*m*) *Proctor* v. *Jones*, 2 C. & P. 532.

[In *Hunt* v. *Hecht* (*n*), in 1853, the defendant examined a heap of bones lying on the plaintiff's premises, and instructed the plaintiff to put a certain quantity into sacks and to send them to a wharf for shipment. As soon as he heard of the delivery at the wharf he inspected them and refused to accept them as not being what he had bargained for, and the Court held that although there was a receipt there was no evidence of acceptance (*o*).

In *Nicholson* v. *Bower* (*p*), in 1858, the plaintiff was the purchaser's assignee; the purchaser had agreed to buy by sample, of the defendant, 141 qrs. of wheat which the defendant sent to London, where it was warehoused by a carrier. The purchaser sent to the warehouse for a sample, and having examined it, gave orders that the bulk was not to be sent for. He was then insolvent, and the Court, being of opinion that he acted in this way thinking that he ought not under the circumstances to except the wheat, held that there had been no acceptance.

In *Hart* v. *Bush* (*q*), in 1858, the vendee in Lancaster ordered brandy of the vendor's traveller to be sent to a wharf in London to be shipped from there to him at Lancaster: the ship was lost. It was held that there was no acceptance.

In *Simmonds* v. *Humble* (*r*), in 1862, the defendant, having pur-[*22] chased hops lying in a warehouse, by sample, sent his *agent to meet the plaintiff's agent: the two agents went over the hops, compared the bulk with the sample, and agreed on certain allowances. Nothing further was done, and the Court was of opinion that this was evidence of acceptance.]

In *Hanson* v. *Armitage* (*s*), 1822, the King's Bench decided that a receipt by the purchaser's customary carrier was no acceptance; and in *Acebal* v. *Levy* (*t*), in 1834, the Common Pleas ruled the same point of a receipt on board a ship chartered by the purchaser. The reason assigned in both cases was the same: the purchaser might still consistently object to the goods when they came to his hands, in other words, the agent was not an agent having authority to accept the goods, though he had authority to receive them (*u*). These cases are inconsistent with and must be considered as overruling a Nisi Prius decision of Chambre, J. (*x*), in 1814, in which he con-

(*n*) *Hunt v. Hecht*, 8 Ex. 814; 22 L. J. Ex. 293.

(*o*) See also *Norman* v. *Phillips*, in 1845, 12 M. & W. 277; 14 L. J. Ex. 306, where the Court was of opinion that although there might be a scintilla of evidence, there was not sufficient evidence to warrant a jury in finding that there had been an acceptance.

(*p*) *Nicholson* v. *Bower*, 1 E. & E. 172; 28 L. J. Q. B. 97.

(*q*) *Hart* v. *Bush*, E. B. & E. 494; 27 L. J. Q. B. 271.

(*r*) *Simmonds* v. *Humble*, 13 C. B. N. S. 258; 9 L. T. 168.

(*s*) *Hanson* v. *Armitage*, 5 B. & A. 557.

(*t*) *Acebal* v. *Levy*, 10 Bing. 376.

(*u*) *Coombs* v. *Bristol and Exeter Ry. Co.*, in 1858, 3 H. & N. 510; 27 L. J. Ex. 401; *Cusack* v. *Robinson*, in 1861, 1 B. & S. 299; 30 L. J. Q. B. 261; *Coates* v. *Chaplin*, in 1842, 3 Q. B. 483; 6 Jur. 1123.

(*x*) *Harte v. Sattley*, 3 Camp. 528. This case is no longer law, 2 E. & B. 370; E. B. & E. 498.

sidered that the purchaser constituted the usual carrier his agent to accept and receive.

[In *Elliott* v. *Thomas* (*y*), in 1838, the defendant ordered certain bundles of cast and common steel from the plaintiff, and there was no doubt that he accepted the common steel, but he refused to pay for the cast. Parke, B., said it must be taken to have been one contract, and therefore there was an acceptance to satisfy the statute.

In *Scott* v. *The Eastern Counties Ry. Co.* (*z*), in 1843, the defendants ordered of the plaintiff several lamps of different constructions, and among them a triangular lamp, which was the one in question: they were all delivered and paid for except the triangular one, which took a long time to make, and when made the defendants refused to accept it. The *Court held that it was one contract, and that [*23] the acceptance of some of the lamps took the case out of the statute.

In *Bigg* v. *Whisking* (*a*), in 1853, the defendant accompanied the plaintiff to several places a few miles apart, and bought timber at each; the plaintiff then signed a memorandum of what had taken place. The defendant, after accepting some of the timber, refused to accept the residue. But the Court was of opinion it was one contract, and that there had been a part acceptance, following *Elliott* v. *Thomas* (*b*).

In *Beaumont* v. *Brengeri* (*c*), in 1847, where the defendant agreed to purchase a carriage and had some alterations made in it, and had it placed in a back shop, and subsequently drove out in it, paying the hire of the horse and man: held that there was sufficient evidence of acceptance.

In *Saunders* v. *Topp* (*d*), in 1849, the defendant went to the plaintiff's farm and there selected forty-five couple of sheep out of a flock and directed that they should be sent to Wimborne, where he allowed them to remain two days and then sent his man for them. After seeing them he appears to have approved of them, but on the day following their arrival he returned them on the ground that they were not the ones he had bought. He had not been to Wimborne to look at them, as he was bound to do if he intended to object to them, and the Court held that there was evidence of acceptance (*e*).

But the mere fact that the purchaser, in examining the goods sent on approval, has done more to the goods than was necessary to inform himself of their quality, is not conclusive evidence of acceptance, but is some evidence: as in *Curtis* v. *Pugh* (*f*) in 1847, where he unpacked the goods more completely than was necessary.

(*y*) *Elliott* v. *Thomas*, 3 M. & W. 170.
(*z*) *Scott* v. *The E. C. Ry. Co.*, 12 M. & W. 33; 13 L. J. Ex. 14.
(*a*) *Bigg v. Whisking*, 14 C. B. 195.
(*b*) *Elliott* v. *Thomas*, 3 M. & W. 170.
(*c*) *Beaumont* v. *Brengeri*, 5 C. B. 301.
(*d*) *Saunders* v. *Topp*, 4 Ex. 390; 18 L. J. Ex. 374.
(*e*) See also *Bushel* v. *Wheeler*, in 1844, 15 Q. B. 442.
(*f*) *Curtis* v. *Pugh*, 10 Q. B. 111; 16 L. J. Q. B. 199.

In *Cusack* v. *Robinson* (*g*), in 1861, the defendant saw certain [*24] *firkins of butter lying in the plaintiff's cellar at Liverpool. He agreed to buy them and gave instructions to the plaintiff as to sending them to Fenning's Wharf in London, where they were eventually delivered. There was ample evidence of receipt, but the defendant's case was that the acceptance should follow, or be contemporaneous with the receipt. The Court held that it might be after it, and upheld the verdict for the plaintiff.

In *Taylor* v. *Wakefield* (*h*), in 1856, the plaintiff had entered into possession, as tenant of the defendant, of a certain mill and machinery. There was a verbal agreement that upon the expiration of the tenancy the plaintiff might take the machinery at a price. When the plaintiff tendered the money the defendant repudiated the contract. The Court held that there was no evidence of acceptance before the contract was revoked. Erle, J. said, "If the pur-"chaser takes to the goods as such, and changes the character in "which he holds them, it is an acceptance as against him * * "and it may be, that such an act, if done by the purchaser in fur-"therance of the contract before it is revoked, would bind the con-"tract as against the vendor also."

And in *Smith* v. *Hudson* (*i*), in 1865, where, on the insolvency of the purchaser, the vendor, who had delivered goods at a railway station, ordered the railway company not to deliver them; and at that time the purchaser, who had a right to reject them if they were not up to sample, had not elected to accept them, but did so after the countermand; the Court held that there could be no acceptance without the consent of the vendor.

And if the vendee accepts the goods, but says at the time that he accepts them on other terms than those on which the vendor is willing to deliver them, that is a sufficient acceptance (*k*).

Since the first edition of this work was published a good [*25] *many cases have been decided on this subject, some of which are authorities on both points, viz., whether there was a receipt, and also whether there was an acceptance, and these will be found in the following section.]

Section II.

What constitutes an actual receipt.

The cases, as has been already observed, are not quite so easily reconciled upon the question of what constitutes an actual receipt.

(*g*) *Cusack* v. *Robinson*, 1 B. & S. 299; 30 L. J. Q. 261.
(*h*) *Taylor* v. *Wakefield*, 6 E. & B. 765; 2 Jur. N. S. 1086.
(*i*) *Smith* v. *Hudson*, 34 L. J. Q. B. 145; 6 B. & S. 431.
(*k*) *Tomkinson* v. *Straight*, in 1856, 25 L. J. C. P. 85; 17 C. B. 698.

There can be no question, that an actual removal of the goods by the purchaser is an actual receipt by him; and when the goods are in the hands of a third party, it is pretty clear that as soon as the vendor, the purchaser, and the bailee agree together that the bailee shall cease to hold the goods for the vendor and shall hold them for the purchaser, that is an actual receipt by the purchaser, though the goods themselves remain untouched. They were in the possession of an agent for the vendor and so in contemplation of law in that of the vendor himself; and they become in the possession of an agent for the purchaser, and so in that of the purchaser himself; and it can make no difference, whether this is by a change in the person of the holder of the goods or merely in his character. So far the question of whether there has been a receipt of part of the goods by the purchaser or not is identically the same as whether the vendor has so parted with possession as to put an end to his lien as to that part of the goods.

Thus, in *Bentall* v. *Burn* (*l*), in 1824, the King's Bench decided that the acceptance and receipt of a delivery order not lodged with the warehouseman did not bind the bargain: till the warehouse-keepers assented to hold the property as agents of the vendee they held it as agents of the vendor, and whilst they did so there could be no actual acceptance (receipt?) of the goods.

[It has already (*m*) been pointed out that a carrier, although not an agent to accept, is an agent to receive.]

But when the goods are in the custody of the vendor himself or his immediate servants and not of a middleman, there is a difficulty. It will be shown in its proper place (*post*, page 335), that when the purchaser or his assigns and the vendor come to an agreement that the vendor shall cease to hold the goods as vendor and shall hold them as an agent of the owner of the goods, his rights as vendor are gone; and though the cases now show that such an agreement between the vendor and the original purchaser himself must be proved by stronger evidence than one between him and a subvendee, it does not seem disputed that such an agreement may be made. At one time, the weight of authority was, that such an agreement was to be readily presumed; now the weight of authority is, that such an agreement must be very distinctly proved, and that unless the vendor's lien on some part of the goods be gone there cannot be an *actual* receipt. [*26]

In *Chaplin* v. *Rogers* (*n*), in 1800, the plaintiff, by a verbal agreement, sold to the defendant for more than 10*l.*, a stack of hay, which he represented to be good. The hay remained in the plaintiff's stack-yard. The defendant seems to have expressed an opinion that the hay was bad, but some time after, one Loft having agreed for the purchase of part of the hay from him at an advanced

(*l*) *Bentall* v. *Burn*, 3 B. & C. 423.
(*m*) *Ante*, pp. 17, 22.
(*n*) *Chaplin* v. *Rogers*, 1 East, 195, n.

price, the defendant told him to go and see if it was good. Loft not only thought it good, but took away part without the knowledge or assent of the defendant. The part resold to Loft seems to have been for less than 10*l.*, in which case, the bargain between him and the defendant may have been binding, so that the defendant could not have revoked the authority given to Loft by it, but the case does not seem to have turned upon that. It was left to the jury to say, if there had an acceptance, and they having found there was, the King's Bench would not disturb their verdict. The expressions used by Lord Kenyon in delivering judgment, show that he thought there might be an acceptance and actual receipt without a removal of the goods; and that the conduct of the defendant, in bargain- [*27] ing about the re-sale, *was an admission that the contract was good; but he winds up by saying, "as upon the whole justice "has been done, the verdict ought to stand;" which almost means that the verdict was contrary to evidence. This case, therefore, does not decide much.

In *Anderson* v. *Scott* (*o*), in 1806, at Nisi Prius, the action was by the purchaser against the vendor for not delivering wine, according to a verbal agreement for the sale of it for a price exceeding 10*l.* The spills had been cut in the presence of both parties, and the purchaser's initials were marked on the casks, which remained in the vendor's cellars. It was objected, that the bargain was void by the Statute of Frauds, but Lord Ellenborough held that the marking of the casks in the presence of all parties amounted to a delivery, and that though there had been an incipient delivery sufficient to take the case out of the Statute of Frauds, yet that delivery not having been perfected, the plaintiff had a right of action to recover damages for the non-completion of the contract.

In *Hodgson* v. *Le Bret* (*p*), in 1808, the same Judge ruled that the purchaser having written her name on some goods to denote that she had purchased them, though they remained in the vendor's shop, took the case out of the statute. Parke, J., has observed, "that in the older cases the Court did not avert to the "words of the statute (*q*)." Certainly, in *Anderson* v. *Scott* (*o*), Lord Ellenborough, if the words of the statute were present to his mind, must have thought that there might be an actual receipt without any delivery, which is not the popular meaning of the words. It appears from *Hurry* v. *Mangles* (*r*), that Lord Ellenborough considered the vendor's rights gone under circumstances but little stronger than those existing in *Hodgson* v. *Le Bret* (*p*), and [*28] *Anderson* v. *Scott* (*o*). He seems to have thought that *the circumstance of the purchaser exercising acts of ownership with the assent of the vendor, proved a complete agreement between them to

(*o*) *Anderson* v. *Scott*, 1 Camp. 235, n.
(*p*) *Hodgson* v. *Le Bret*, 1 Camp. 233.
(*q*) 9 B. & C. 577.
(*r*) *Hurry* v. *Mangles*, 1 Camp. 452.

consider the possession of the vendor as thenceforward that of a mere agent of the purchaser.

In *Elmore* v. *Stone* (*s*), in 1808, the Common Pleas acted upon this principle. In that case the defendant, the purchaser of horses under a verbal agreement from the plaintiff, a livery stable keeper, had sent him word that he would have the horses, but that as he had neither servant nor stables, the plaintiff must keep them at livery for him. The plaintiff assented, and moved the horses into another stable (which, however, seems material only as an indication of assent). The Common Pleas, after taking time to consider, held that the bargain was bound. Mansfield, C. J., in delivering the opinion of the Court, said, "After the defendant had said that the "horses must stand at livery, and the plaintiff had accepted the "order, it made no difference whether they stood at livery in the "vendor's stable, or whether they had been taken away and put in "some other stable. The plaintiff possessed them from that time "not as owner (vendor?) of the horses, but as any other livery sta-"ble keeper might have them to keep. Under many events, it "might appear hard if the plaintiff should not continue to have a "lien upon the horses which were in his own possession, so long as "the price remained unpaid, but it was for him to consider that be-"fore he made his agreement. After he had assented to keep the "horses at livery, they would on the decease of the defendant have "become general assets; and so if he had become bankrupt, they "would have gone to his assignees. The plaintiff could not have "retained them, though he had not received the price."

In *Blenkinsop* v. *Clayton* (*t*), in 1817, after a verbal sale of a horse [standing in a stable during a fair to which it had been sent for sale], the purchaser offered to resell it to a third party, but afterwards refused to go on with the bargain: *the vendor [*29] brought an action for the price, and on proof of the facts above-stated had a verdict subject to leave to move to enter a nonsuit, on the ground that there was nothing to satisfy the statute. The Court of Common Pleas thought that there might be some evidence of a delivery, and therefore granted a new trial, not a nonsuit.

In all these cases there seems to have been ample evidence of an acceptance of the goods, but scanty evidence of any actual receipt, if by that is to be understood a taking of possession; indeed, in *Blenkinsop* v. *Clayton*, (*t*), as reported, there seems to have been none. After the decision of the last case, the current of authority set the other way and [it became necessary to prove distinctly that the vendor had agreed to hold the goods as the bailee of the purchaser].

In *Howe* v. *Palmer* (*u*), in 1820, there was a verbal sale of twelve

(*s*) *Elmore* v. *Stone*, 1 Taunt. 458.
(*t*) *Blenkinsop* v. *Clayton*, 7 Taunt. 597.
(*u*) *Howe* v. *Palmer*, 3 B. & A. 321.

bushels of tares at 1*l.* per bushel, the purchaser to send for them. The purchaser said he had seen the tares, and had no immediate use for them, he therefore requested that they might remain at the vendor's till seed time, to which the vendor assented. The vendor then went home, measured out twelve bushels, and set them aside for the purchaser. The King's Bench held that these facts did not amount to an acceptance and receipt. The case was distinguished by the Court from *Elmore* v. *Stone* (*x*), but Bayley, J., expressed a doubt if that case was well decided.

In *Tempest* v. *Fitzgerald* (*y*), in the same year, the facts were that a horse was sold by parol for 45*l.* ready money; after the sale, the purchaser mounted him and tried him, and made some changes in his harness; he then asked the vendor to keep him another week, the vendor said he would to oblige him; before the week expired the horse died, and the question was who should bear the loss? The King's Bench decided that these acts could not amount to an acceptance and receipt, unless the purchaser had a right under the [*30] bargain to *take away the horse. He could not take away the horse unless he paid the price, or the vendor waived his right of lien, which the facts did not show.

In *Carter* v. *Touissaint* (*z*), in 1822, the facts approached very nearly indeed to those in *Elmore* v. *Stone* (*x*). The defendant purchased by parol, from the plaintiffs, a horse for 30*l.*; the horse was, by the defendant's consent and approval, fired, and the plaintiffs agreed to keep him for twenty days without charge; at the end of the twenty days the plaintiffs sent the horse to grass at the defendant's request, but entered it in their own name, as the defendant wished to conceal his having bought it. The King's Bench held that the plaintiffs must be taken to have kept possession in their character of vendors until something showed an abandonment of their lien, and that so long as there was nothing to divest them of their possession in the character of vendors, there could be no receipt by the purchaser within the Statute of Frauds. The Court made some attempt to distinguish the case from *Elmore* v. *Stone* (*x*), on the ground that in that case there was a change of stables, but that fact the Common Pleas had expressly declared to be immaterial. The two cases are agreed in this, that there could not be a receipt till the vendor's lien was divested, but they differ as to what is sufficient to divest the lien.

[*Boulter* v. *Arnott* (*a*), in 1833, which really turned on the form of pleading, is instructive as showing the difference between "acceptance" under the Statute of Frauds and "receipt." The action was assumpsit for goods sold and delivered, and the facts were that

(*x*) *Elmore* v. *Stone*, 1 Taunt. 458, *ante*, p. 28.
(*y*) *Tempest* v. *Fitzgerald*, 3 B. & A. 680.
(*z*) *Carter* v. *Touissaint*, 5 B. & A. 855.
(*a*) *Boulter* v. *Arnott*, 1 Cr. & Mee. 333.

the defendant went into the plaintiff's shop and purchased some cigars, which were packed in boxes supplied by the defendant, and left in the plaintiff's shop to be called for. The cigars were to be paid for before being removed.

On the motion to set aside the nonsuit, Bayley, B., said, *in [*31] refusing it, "From first to last these goods remained in the possession of the plaintiff. It is an entirely different question, whether "doing an act like marking or packing for the vendee in his presence "may not operate as an acceptance by him under the Statute of "Frauds. The question here is whether there was a delivery to the "vendee. I do not agree that the boxes are to be considered as having been the warehouse of the defendant."

In *Holmes* v. *Hoskins* (*b*), in 1854, the defendant selected some cattle in the plaintiff's field, and was going to pay for them, but found he had forgotten his cheque book. The plaintiff and defendant then arranged that the cattle should remain for some days in the plaintiff's field, and that the defendant should send his men to feed them, which was done. The Court held that there was no evidence of receipt.

In *Castle* v. *Sworder* (*c*), in 1861, the plaintiffs were wine merchants, and also acted as warehousemen, having a bonded warehouse where they warehoused goods of others and allowed the goods they sold to remain, charging a rent to the purchaser. They sold certain rum to the defendant at six months' credit, and it was agreed that the rum should lie in the warehouse for six months free of charge. They sent the defendant an invoice, which stated in effect that the rum might remain six months without charge, and entered the defendant's name in their warehouse-book as purchaser. After the expiration of the credit the defendant asked the plaintiffs to take back the rum, and they declined. The plaintiff was nonsuited by Bramwell, B., and Martin, Channell, and Bramwell sustained the nonsuit on the motion, but on appeal to the Exchequer Chamber, Cockburn, C. J., Crompton, Williams, Byles, and Keating, JJ., held that there was some evidence of an acceptance and receipt, and ordered a verdict to be entered for the plaintiff. A contract with a person known to be a warehouseman to warehouse goods free of charge for six months is certainly some evidence against *both parties that the warehouseman holds as such and not [*32] as vendor, and that coupled with the request to take back the rum appears to be clearly some evidence of an actual receipt. It is worth noting also that the sale being on credit the vendor's lien was gone at one time.

In *Marvin* v. *Wallis* (*d*), in 1856, the vendor remained in possession of a horse after the sale. The jury found that the purchaser

(*b*) *Holmes* v. *Hoskins*, 9 Ex. 753.
(*c*) *Castle* v. *Sworder*, 5 H. & N. 281; 6 H. & N. 828; 30 L. J. Ex. 310.
(*d*) *Marvin* v. *Wallis*, 6 E. & B. 726; 25 L. J. Q. B. 369.

had lent it to the vendor to keep, and the vendor obtained a verdict which the Court refused to set aside.]

In *Baldey* v. *Parker* (*e*), in 1823, the defendant bargained in the plaintiff's shop for goods above the value of 10*l.*; some of the articles were measured in his presence, some he marked in pencil, some he assisted in cutting from a larger piece. The King's Bench decided that there was no evidence that the bargain was bound. The ground of their decision is concisely stated by Holroyd, J. "Upon a sale of specific goods for a specific price, by parting with "the possession, the seller parts with his lien. The statute con-"templates such a parting with the possession, and therefore as "long as the seller preserves his control over the goods so as to re-"tain his lien, he prevents the vendee from accepting and receiving "them as his own within the meaning of the statute." This case very closely resembles *Anderson* v. *Scott* (*f*) and *Hodgson* v. *Le Bret* (*g*) in the facts. It seems that the difference between the decisions is rather on the practical application of the law than its nature; Lord Ellenborough seems to have thought that the vendors had abandoned their lien under circumstances which in *Baldey* v. *Parker* (*e*) were held not to be any evidence of such abandonment.

In *Smith* v. *Surman* (*h*), in 1829, the King's Bench, of which Littledale, J., and Parke, J., had become members, acted on the principal laid down in *Baldey* v. *Parker* (*e*).

[*33] *In *Maberley* v. *Shepherd* (*i*), in 1833, the plaintiff under a verbal contract, was building a wagon for the defendant; the defendant furnished a tilt and ironwork, which he fixed on the wagon whilst it was building. The plaintiff brought an action for goods sold and delivered, and was nonsuited. The Court of Common Pleas refused to set aside the nonsuit. It is difficult to see how any question on the Statute of Frauds could arise, as according to the report there was not the shadow of proof that the goods were delivered, and there was no count for goods bargained and sold, or for not accepting goods. But the report probably is in some respect inaccurate, for the Court did consider the question of whether the bargain was bound, and they decided it was not. "The plaintiff," said Tindal, C. J., "retained his lien upon the wagon, and there "was nothing in the facts that denoted any intention either to de-"liver or accept. The circumstances of the case certainly leave it "open to doubt whether the statute has been complied with or not, "but we think it is the duty of the plaintiff to free the case from all "doubt, and where any remains, that it is safer to adhere to the "plain intelligible words of the statute, which point as clearly as

(*e*) *Baldey* v. *Parker*, 2 B. & C. 37.
(*f*) *Anderson* v. *Scott*, 1 Camp. 235, n.
(*g*) *Hodgson* v. *Le Bret*, 1 Camp. 233.
(*h*) *Smith* v. *Surman*, 9 B. & C. 561.
(*i*) *Maberley* v. *Shepherd*, 10 Bing. 99.

"words can to an actual delivery and an actual receiving of part or "the whole of the goods sold."

In *Bill* v. *Bament* (*k*), in 1841, the defendant having bargained for a quantity of brushes from the plaintiff, saw them at the warehouse of the plaintiff's agent, Hervey (by name), and directed a boy to alter the mark on them, and to send them to St. Catherine's Wharf. There was a signature obtained by a trick after action commenced to a receipt for the goods. The Exchequer set aside a verdict which the plaintiff had obtained for the goods sold and delivered, and entered a nonsuit. Parke, B., said, "To take the case "out of the 17th section there must be both delivery and accept-"ance, and the question is, whether they have been proved in the "present case. I think they have not; I agree that *there [*34] "was evidence for the jury of acceptance, or rather of intended ac-"ceptance. The direction to mark the goods was evidence to go to "the jury *quo animo* the defendant took possession of them, so also "the receipt" (*i. e.* the receipt in writing, signed by the defendant) "was some evidence of an acceptance; but there must also be a "delivery, and to constitute that, the possession must have been "parted with by the owner, so as to deprive him of the right of "lien; Harvey might have agreed to hold the goods as the ware-"houseman of the defendant, so as to deprive himself of the right "to refuse to deliver them without payment of the price, but of that "there was no proof."

In *Edan* v. *Dudfield* (*l*), in 1841, the case was reversed: the vendor sold the goods to his factor, who had the goods in his possession at the time of sale. The Queen's Bench held, that if the jury thought he had taken to them as purchaser, it was sufficient to satisfy the statute.

[This case was approved in *Lillywhite* v. *Devereux* (*m*), in 1846, where the question was whether the defendant had taken to the goods as purchaser or hirer.

In *Marshall* v. *Green* (*n*), in 1875, the sale was of standing timber, and the vendee had agreed to resell the tops and stumps, and had cut down some of the trees. Held that there was ample evidence of acceptance and receipt.]

There are some expressions used in the judgment of the Queen's Bench in *Dodsley* v. *Varley* (*o*), in 1840, which are apparently at variance with the principle of the other modern cases, but the expressions there used when construed with reference to the point before the Court do not necessarily show that the Queen's Bench took a different view of the law from that taken in the other cases. It seems better to insert the report at length (so far as it bears on

(*k*) *Bill* v. *Bament*, 9 M. & W. 37.
(*l*) *Edan* v. *Dudfield*, 1 Q. B. 306; 5 Jur. 317.
(*m*) *Lillywhite* v. *Devereux*, 15 M. & W. 285.
(*n*) *Marshall* v. *Green*, 1 C. P. D. 35; 45 L. J. C. P. 153.
(*o*) *Dodsley* v. *Varley*, 12 A. & E. 632.

this point), rather than run the risk of omitting something material [*35] in abridging *it. The plaintiff had obtained a verdict on a count for goods bargained and sold, and an application was made to the Court to set aside this verdict. Lord Denman delivered the judgment of the Court: "It was contended," said he, "that there "was no contract completed by delivery and acceptance, so as to "satisfy the Statute of Frauds. The facts were, that the wool was "bought while at the plaintiff's; the price was agreed on, but it "would have to be weighed; it was then removed to the warehouse "of a third person, where Bamford collected the wools which he "purchased for the defendant from various persons, and to which "place the defendant sent sheeting for the packing up of such "wools. There it was weighed, together with the other wools, and "packed, but it was not paid for; it was the usual course for the "wool to remain at this place till paid for. No wish was expressed "to take the opinion of the jury on the fact of Bamford's agency, "the defendant's counsel acquiescing in that of the Judge, provided "the circumstances would amount to it in point of law. We agree "that they might; therefore all these must be taken to be the acts "of the defendant. Then, he has removed the plaintiff's wool to "a place of deposit for his own wools; he has weighed it with his "other purchases of wools; he has packed it in his own sheeting; "everything is complete but the payment of the price. It was "argued, that because by the course of dealing he was not to "remove the wool to a distance before payment of the price, the "property had not passed to him, or that the plaintiff retained such "a lien upon it as was inconsistent with the notion of an actual "delivery. We think that, upon this evidence, the place to which "the wools were removed must be considered as the defendant's "warehouse, and that he was in actual possession of it there as soon "as it was weighed and packed; that it was thenceforward at his "risk, and if burnt must have been paid for by him. Consistently "with this, however, the plaintiff had, not what is commonly called "a lien determinable on the loss of possession, but a special interest "sometimes but improperly called a lien growing out of his original [*36] "*ownership, independent of the actual possession, and con-"sistent with the property being in the defendant. This he retained "in respect of the term agreed on, that the goods should not be "removed to their ultimate place of destination before payment; "but this lien is consistent; as we have stated, with the possession "having passed to the buyer: so that there may have been a "delivery to and actual receipt by him. This we think is the "proper conclusion upon the present evidence, and there will be "no rule."

It seems perfectly clear, that if Bamford was the defendant's agent, there was ample evidence of such an appropriation of the specific wools as would convert the agreement to sell into a bargain and sale, and (if the Statute of Frauds were out of the way)

transfer the property and consequent risk to the defendant. The only question, therefore, in the case was, whether the facts shewed such a receipt of the goods as is contemplated by the Statute of Frauds. The argument for the defendant seems to have been that the agreement by which the purchaser was not to remove the wool till paid for, shewed that the acts done to the wool could not be done with the intention to give him possession. The Court, however, seemed to have thought that the facts shewed an unequivocal delivery of the actual possession, and consequently that the agreement could only operate by giving such rights to the vendor as were consistent with an actual delivery of possession to the purchaser. In *Howes* v. *Ball* (*p*), it was decided that an agreement of this kind did not confer on the vendor any right either of property or possession in the goods actually delivered, but at most operated as a personal license from the purchaser. Probably the Queen's Bench, in *Dodsley* v. *Varley* (*q*), would have come to the same decision if it had been material to determine what rights Dodsley had in the wool, but that being perfectly immaterial to the question then before the Court, they did not consider that point. The *judgment, therefore, in *Dodsley* v. *Varley* (*q*), cannot [*37] be taken to shew that the Queen's Bench thought that there might be an actual receipt of goods by the purchaser within the meaning of the Statute of Frauds without such a taking of possession by him as would completely determine the vendor's rights in the part of the goods so received, and consequently the case does not affect the authority of *Baldey* v. *Parker* (*r*), and the other cases before quoted.

It may therefore be considered as settled, that the construction of the statute is that so concisely and clearly stated by Holroyd, J., in *Baldey* v. *Parker* (*r*), and repeated in almost the same terms by Parke, B. in *Bill* v. *Bament* (*s*), namely, that the facts which prove that part of the goods have been delivered and taken into the purchaser's control, so as to determine the vendor's possession of that part, prove that he has actually received them, and that nothing short of such a delivery and taking can amount to an actual receipt by the purchaser within the meaning of the Statute of Frauds.

[In *Farina* v. *Home* (*t*), in 1846, where the vendor sent a case of *eau de Cologne* to his agent in London, who warehoused it, obtained a delivery-warrant and indorsed it to the purchaser, who kept it in his possession for ten months, the Court held that although there was sufficient evidence of an acceptance there was none of the receipt.

(*p*) *Howes* v. *Ball*, 7 B. & C. 484.
(*q*) *Dodsley* v. *Varley*, 12 A. & E. 632.
(*r*) *Baldey* v. *Parker*, 2 B. & C. 37, *ante*, p. 32.
(*s*) *Bill* v. *Bament*, 9 M. & W. 37.
(*t*) *Farina* v. *Home*, 16 M. & W. 119; 16 L. J. Ex. 73.

In *Currie* v. *Anderson* (*u*), in 1860, the defendant sent to Hanson & Co., in Constantinople, the bill of lading for goods which he had ordered from the plaintiffs but not examined, and which the plaintiffs had shipped at his request. The bill of lading was to be handed over by Hanson & Co. to a person named by the defendant when he should call for it. That person was unable to call for it for some months, and then the goods were not forthcoming. The Court held there was ample evidence of acceptance and receipt.

[*38] *In the following case of *Meredith* v. *Meigh* (*x*), in 1853, there seems to have been no evidence either of acceptance or receipt, although there had been a delivery to a carrier.

China clay was to be sent, according to a verbal agreement, by the vendor in Cornwall, by sea to Liverpool, and thence by a carrier to the vendee in Staffordshire. The vendor sent the bill of lading to the carrier to enable him to obtain delivery at Liverpool. The cargo was lost at sea, and the vendee, who was the defendant, objected that there was no evidence of an acceptance and receipt. The defendant obtained a verdict, which the Court refused to set aside.

Erle, J., said, "Placing goods ordered on board ship is good "evidence of a delivery in support of a count for goods sold and "delivered; but that is not the same as the question under the 17th "section of the Statute of Frauds. I have no doubt that the bill "of lading, which is the symbol of the property, may be so received "and dealt with as to be equivalent to an actual receipt of the "property itself." But that was not the case here.]

(*u*) *Currie* v. *Anderson*, 2 E. & E. 595; 29 L. J. Q. B. 87.
(*x*) *Meredith* v. *Meigh*, 2 E. & B. 364; 22 L. J. Q. B. 401.

*CHAPTER III. [*39]

OF THE SECOND EXCEPTION.

THE second exception, viz., "Except the buyer shall give some-"thing in earnest to bind the bargain or in part payment," need not detain us long. The words have in practice been found so intelligible that there are very few cases in which any decision on the meaning of this clause is reported. In *Blenkinsop* v. *Clayton* (*y*), in 1817, the buyer drew a shilling across the vendor's hand, and put it in his own pocket to strike the bargain, and the Court of Common Pleas thought that he had not *given* anything in earnest.

It need only be observed, that there cannot be any payment unless it is accepted as well as given as payment.

[In *Walker* v. *Nussey* (*z*), in 1847, on a sale of goods, the buyer and seller agreed that a debt which the seller owed to the buyer should be set off in part payment. The jury found a verdict for the defendant, and on the motion a new trial was refused, Parke, B., saying, "no evidence was given of the actual payment or dis-"charge of the debt due from the plaintiff (the seller), so that all "rested in the agreement merely" (*a*).]

In order to take the case out of the statute by a part payment, it is probably not essential that the part payment should be in money (*b*).

(*y*) *Blenkinsop* v. *Clayton*, 7 Taunt. 597. See also *Bach* v. *Owen*, 5 T. R. 409; *Goodall* v. *Skelton*, 2 H. Bl. 316.

(*z*) *Walker* v. *Nussey*, 16 M. & W. 302; 16 L. J. Ex. 120.

(*a*) See *Hooper* v. *Stephens*, in 1835, 4 Ad. & El. 71; and *Hughes* v. *Paramore*, in 1855, 7 De G. M. & G. 229; 24 L. J. Ch. 681.

(*b*) See the remarks of Erle, J., in *The Queen* v. *St. Michaels*, in 1856, 6 E. & B. 819; 25 L. J. Q. B. 379; and *Hart* v. *Nash*, 2 Cr. Mee. & R. 337.

[*40]

*CHAPTER IV.

OF THE THIRD EXCEPTION.

What is a sufficient memorandum, p. *44.
What is a sufficient signature, p. *66.
Who is an agent authorized to sign, p. *72.

The third exception, "Except that some note or memorandum in "writing of the said bargain be made and signed by the parties to "be charged by such contract or their agents thereunto lawfully "authorized," is probably that which would be most apt to mislead a person not acquainted with the decisions. It is to be observed that the statute does not interfere with the rules of evidence applicable to written testimony (*c*). A signed note or memorandum of the bargain is one way of making the contract good, but the legal effect of such a note or memorandum upon the proof of the contract is left entirely as it was at common law. It is perfectly competent for persons who are entering into any agreement either to have the whole terms of it reduced to writing, or to make their agreement with reference to some previously existing writing, and if they do so, whether the writing be signed or not the parties must be bound by its contents; they are not allowed by the law to show that there was a mistake, and that they intended to agree to something different from what is stated in the writing, for the very object of agreeing to a writing is to prevent disputes about what they intended; this rule of law is very inflexible: And if the parties [*41] have *expressed their assent to the reduction of the whole contract to writing, they are in general prohibited from adding anything to the terms expressed in the writing: this is to be understood of terms that require an agreement between the parties, for where the terms reduced to writing are such that a legal duty would result, that legal duty is added to the terms of the contract. To this last rule, however, there is a wide class of exceptions, arising from local customs and the usage of particular trades.

[Parke, B., said in *Hutton* v. *Warren* (*d*), in 1836: "It has "long been settled, that in commercial transactions extrinsic evi- "dence of custom and usage is admissible to annex incidents to "written contracts, in matters with respect to which they are silent

(*c*) It would be too much of a digression to attempt to state with precision the laws of evidence relating to written contracts, but so much of the construction of this section depends on a knowledge of that law, that it seems proper to try to state the leading principles of it, though without attempting to give the qualifications necessary to render such a statement accurate and without attempting to collect the authorities.

(*d*) *Hutton* v. *Warren*, 1 M. & W. 475.

" . . . . And this has been done upon the principle of presump-
" tion that, in such transactions, the parties did not mean to express
" in writing the whole of the contract by which they intended to
" be bound, but a contract with reference to these known usages."]

There is no rule of common law to prohibit the parties from making an agreement part only of which is to be proved by writing. If the parties say in substance, "we agree to the terms contained "in such a writing, with the exceptions and additions which at such a time were agreed upon by word of mouth;" there is no legal objection to this. Parol evidence may be used to show what the exceptions and additions are, the writing is conclusive as to the rest.

When either the part or the whole of an agreement is thus reduced to writing, the agreement cannot (in general) be proved by any other means than by showing what the contents of the writing are, so that independently of any statue the writing is a necessary part of his case who seeks to prove the agreement. But if the terms are put in writing, but not as a matter of compact between the parties to settle what the terms are, the case is different. If the writing is made by a bystander, without any authority from the parties, the writing is not evidence at all, though it may be used to *refresh the memory of him who made it. If one of the [*42] parties only authorized the making of the memorandum, or afterwards admitted its accuracy, it is evidence against him as an admission, but not in law either indispensably necessary for the proof of the contract, or conclusively binding upon him against whom it is evidence.

Now the Statute of Frauds leaves this law quite as it was before. If the contract, or part of it, is in writing, the writing must be proved, though there has been a part payment or a part acceptance and receipt; and if the writing is a part of the agreement it must be proved, though it would not satisfy the third exception, either because it is not signed, or for any other reason. And the writing, when proved, has just as much effect in settling conclusively what the terms of the bargain are, as it would have had if the Statute of Frauds had never been passed. The proof of the writing is as indispensable and as conclusive in a contract for the sale of goods for more than 10*l.*, as in one for the sale of goods for less than 10*l.*, and not more so. And when a party has signed a memorandum of the terms of the contract, which is not more than an admission of the terms of the contract, the other party is not forced to use this evidence, if he can in any other way satisfy the exceptions in the statute, and if he does use it the memorandum does not bind the other party more than a similar admission would have done if the price had been less than 10*l.* It is strong evidence of what the agreement is, but it is not the agreement itself. It may make the contract good, because it is in writing and signed, and for the same reason it is capable of clear and undeniable proof, but its effect in

settling the terms of the contract is no greater than that of a similar admission made by word of mouth.

[In *Ford* v. *Yates* (*e*), in 1841, there was a memorandum which the Court treated (erroneously) as a sufficient memorandum of the contract to take the case out of the statute. In it the price was mentioned, but nothing was said about the time of payment. The [*43] Court was of opinion that the *legal effect of the written contract was a sale for ready money, and, therefore, that evidence to show that it was a sale on credit was inadmissible.

But in *Lockett* v. *Nicklin* (*f*), in 1848, the plaintiff seems to have relied on the acceptance and receipt to take the case out of the statute, and he then put in a letter from the defendant to prove some of the terms of the contract, and gave parol evidence on a point on which the letter was silent; and the Court held that such evidence was admissible (*g*).

In *Moore* v. *Campbell* (*h*), in 1854, the plaintiff employed Wilks, a broker, to purchase hemp. Wilks agreed with the defendant to buy it from him, and sent him a note. The defendant drew up and signed another note differing in several respects from Wilks'. The hemp when landed was sold by the defendant in consequence of a difference between him and the plaintiff as to the quantity, and this action was brought on the note drawn up by the defendant, for damages for not delivering. It was argued for the defendant that, as the bought and sold notes differed, there was no contract. At the trial the judge ordered a verdict for the plaintiff, subject to the opinion of the Court on this point. On the motion Parke, B., delivering the judgment of the Court granting a new trial, said that Wilks had acted not as a broker, but solely as the agent of the plaintiff, and that it was for a jury to say whether both parties intended the defendant's note to be the contract between them, and if so, it would be a sufficient memorandum. But if the defendant never intended to be bound unless the plaintiff was bound also, then there was no contract.

In *Gibson* v. *Holland* (*i*), in 1865, the defendant authorized his agent Rookes to buy a horse from the plaintiffs. Rookes bought it, and then followed a correspondence between him and the defendant, in which the terms of the bargain appeared. The defend- [*44] ant relied on the objection that the *memorandum passed, not between the contracting parties, but between one of those parties and his own agent. But the Court held that the memorandum was sufficient on the ground that the statute did not make it necessary that the memorandum should be addressed to the person who is to take advantage of it.]

(*e*) *Ford* v. *Yates*, 2 M. & Gr. 549; 2 Scott, N. R. 645.
(*f*) *Lockett* v. *Nicklin*, 2 Ex. 93; 19 L. J. Ex. 403.
(*g*) See also *Eden* v. *Blake*, in 1845, 13 M. & W. 614; 14 L. J. Ex. 194.
(*h*) *Moore* v. *Campbell*, 10 Ex. 323; 26 L. J. Ex. 310.
(*i*) *Gibson* v. *Holland*, L. R. 1 C. P. 1; 35 L. J. C. P. 5.

Parke, B., in *Bill* v. *Bament* (*k*), said he was clearly of opinion that the memorandum must be in existence at the time when the action is brought. In that case it had been signed three days afterwards.

To return to the statute. There are three subjects of inquiry:—1stly, What is "a note or memorandum in writing of the bargain?" 2ndly, What is meant by being "signed by the parties to be charged "by such contract?" 3rdly, Who are "their agents lawfully au-"thorized?"

Now, as to what is a note or memorandum of the bargain, it is to be observed that by the express words of the statute it is to be *in writing*, and it has been held, that this means that the writing must contain in itself sufficient matter to amount to the note or memorandum, without calling in any parol testimony to supply the deficiency. If the very paper signed contains in itself the whole that is reduced to writing, the only question is, whether that is sufficient matter to constitute a memorandum of the bargain: but if there be sufficient matter to make a memorandum written on separate pieces of paper, no one of which by itself contains enough, the question arises, if the memorandum of which the contents of these several papers are evidence is *all* in writing or not; if the contents of the signed paper themselves make reference to the others so as to show by internal evidence that the papers refer to each other, they may be all taken together as one memorandum in writing; but if it is necessary, in order to connect them, to give evidence of the intention of the parties that they should be connected, shown by circumstances not apparent on the face of the writings, the memorandum is not all in writing, for it consists partly of the contents of the *writings and partly of the ex- [*45] pression of an intention to unite them, and that expression is not in writing (*l*). If, indeed, the separate papers were at the time of the signature attached to each other, they then in substance formed one paper, and a subsequent separation of them cannot prevent the memorandum from having once existed.

In *Hinde* v. *Whitehouse* (*m*), in 1806, the sale was by auction, subject to certain conditions; a paper containing the conditions was read by the auctioneer and then laid on his desk; he wrote down the purchaser's name opposite the lots in his catalogue, which was headed "To be sold by auction, for particulars apply to Thomas "Hinde," but contained no internal reference to the conditions. The King's Bench held that the bargain was contained in the conditions, and that there was no signed memorandum of the bargain; that which there was, Lord Ellenborough said, was a minute made on the catalogue of sale which was not annexed to the condi-

(*k*) *Bill* v. *Bament*, in 1841, 9 M. & W. 40.

(*l*) This statement was approved by Williams, J., in *N. S. Ry. Co.* v. *Peck*, in 1860, E. B. & E. 1001.

(*m*) *Hinde v. Whitehouse*, 7 East, 558.

tions of sale nor had any internal reference to them by context or the like. "I am therefore of opinion," said he, "that the mere writ-"ing on the catalogue not being by any reference incorporated with "the conditions of sale, is not a memorandum of a bargain under "those conditions of sale."

Precisely the same case came before the King's Bench, in 1824, in *Kenworthy* v. *Schofield* (*n*), and was decided the same way. Holroyd, J., there said, "It appears to me that you cannot call that a "memorandum of a bargain which does not contain the terms of it. "The argument for the plaintiff is, that the conditions being in the "room were virtually attached to the catalogue; but I think as "they were not actually attached or clearly referred to, they formed "no part of the thing signed. In the case put of the separation "of the conditions from the catalogue, during the progress of the "sale, I should say, that the signatures to the latter made after [*46] *"the separation were unavailing. It occurred to me at first "that this might be likened to a will, consisting of several detached "sheets, when a signature of the last, the whole being on the table "at the time would be considered a signing of the whole, but "there the sheet signed is a part of the whole. Here the cata-"logue was altogether independent of the conditions."

[In *Boydell* v. *Drummond* (*o*), in 1809, the defendant had put his name into a list of subscribers to a publication, but there was nothing to connect this list with the prospectus which contained the conditions of sale; the Judges were of the opinion that there was no memorandum. The case was, however, decided on another point.

In *Sarl* v. *Bourdillon* (*p*), in 1856, the things bought, and the prices, were entered into the vendor's order book, and the entry was signed by the buyer. The seller's name was written on the fly-leaf at the beginning of the book. One of the articles was to be altered, and the payment was to be made by a draft, and the memorandum made no mention of this, but the memorandum was held sufficient.

In *Peirce* v. *Corf* (*q*), in 1874, there was a sale of a horse at an auction, but the memorandum of the sale was not attached to the conditions nor made any reference to them: held that section 17 was not satisfied (*r*).]

These cases are strong decisions to show that no intention on the part of the signer to unite two papers will suffice, unless the papers be physically joined, or that intention appear on the face of the papers; but the question of what shall be a sufficient reference of the one paper to another, is a very difficult one. It is not possible to use language so clear and explicit that the meaning may not vary

(*n*) *Kenworthy* v. *Schofield*, 2 B. & C. 945.
(*o*) *Boydell* v. *Drummond*, 11 East, 142.
(*p*) *Sarl* v. *Bourdillon*, 1 C. B. N. S. 188; 26 L. J. C. P. 78.
(*q*) *Peirce* v. *Corf*, L. R. 9 Q. B. 210; 43 L. J. Q. B. 52.
(*r*) See also *Rishton* v. *Whatmore*, in 1878, 8 Ch. D. 467; 47 L. J. Ch. 629; and *Studds* v. *Watson*, 28 Ch. D. 305.

according to the circumstances under which it was used; when, therefore, it appears on the face of a writing that it refers to some-*thing extraneous, there must in every case be some inquiry [*47] into external circumstances to see what it is that is referred to. The Statute of Frauds makes no alteration in this. Precisely the same evidence is admissible to shew what the writing refers to when it is a memorandum of a bargain within the statute, that would be admissible to explain it, if it were a memorandum of a bargain not within the statute; but when it is ascertained to what the writing refers, the statute steps in. If the reference is to something verbal, or ultimately to a writing by the medium of something verbal, the common law would take the whole together as shewing what the contract is, but as one link of the evidence is not in writing, it will not in general operate as a memorandum *in writing* to take the case out of the statute.

It would therefore be necessary for a clear exposition of this part of the subject to enter into the whole question of how far external evidence is by common law admissible to aid the construction and application of writings; but that is too extensive and difficult a subject for a digression. The general rule seems to be, that all facts are admissible which tend to shew the sense the words bear with reference to the surrounding circumstances concerning which the words were used (*s*), but that such facts as only tend to shew that the writer intended to use words bearing a particular sense are to be rejected (*t*).

*The cases reported as to what is a sufficient reference of [*48] documents to each other to form a memorandum within the 17th section are few, and do not afford much assistance.

In *Saunderson* v. *Jackson* (*u*), in 1800, there was a bill of parcels delivered at the time of the bargain which was in itself a sufficient

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[(*s*) See *Macdonald* v. *Longbottom*, 1 E. & E. 977; 29 L. J. Q. B. 256, in 1859; where parol evidence was admitted to shew that "your" wool meant wool which the plaintiff had purchased, as well as that which he had clipped from his own sheep, and *Spicer* v. *Cooper*, 1 Q. B. 424, in 1841. "If there are peculiar expressions used in a contract, which have, in particular places or trades, "a known meaning attached to them, it is for the jury to say what the meaning of these expressions was, but for the Court to decide what the meaning of "the contract was." *Per* Parke, B., in *Hutchinson* v. *Bowker*, 5 M. & W. 542.]

(*t*) See Wigram on Extrinsic Evidence. The principles of the rules of law regulating the admissibility of extrinsic evidence to aid in the construction of wills and of contracts required to be in writing seem to be the same. But in applying them, it seems necessary to bear in mind, that there is a distinction between the two classes of instruments. The will is the language of the testator soliloquizing, if one may use the phrase, and the Court in construing his language may properly take into account all that he knew at the time in order to see in what sense the words were used. But the language used in a contract is the language used to *another* in the course of an isolated transaction, and the words must take their meaning from those things of and concerning which they are used, and those only. This does not affect the law, but it is of some consequence in the application of it, as it narrows the field of inquiry.

(*u*) *Saunderson* v. *Jackson*, 2 B. & P. 238.

memorandum, but there was some doubt whether it was signed by the defendant. The Court of Common Pleas thought it was sufficiently signed, but that even if it was not, the defect was supplied, by this letter addressed to the plaintiff, and signed by the defendant:—"Sir, we wish to know what time we shall send you a part of your order, and shall be obliged for a little time in delivery of the remainder; must request you to return our pipes. We are, &c."

Lord Eldon, C. J., said, in delivering the judgment of the Court, "Although it be admitted that the letter which does not state the "terms of the agreement would not alone have been sufficient, yet, "as the jury have connected it with something which does, and the "letter is signed by the defendants, there is then a written note or "memorandum of the order which was originally given by the "plaintiff, signed by the defendants." It is a great pity that the report does not more fully state what were the facts which Lord Eldon allowed to go to the jury, as evidence to enable them to connect the letter with the bill of parcels.

In *Johnson* v. *Dodgson* (*x*), in the Exchequer in 1837, there had been a written memorandum made [by the defendant, the purchaser, in his own book and] signed by the plaintiff's agent as follows:—"Sold John Dodgson 27 pockets Playstead 1836, Sussex, at 103*s*. The bulk to answer the sample. 4 pockets Selme Beckleys, at 95*s*.; samples and invoices to be sent per Rockingham Coach: [*49] payment in bankers at two *months. Leeds, 19th October, 1836." There was a doubt whether this was signed by the defendant, and the plaintiffs to meet that doubt proved the following letter from the defendant to them:—

LEEDS, WEDNESDAY EVENING,
19th October, 1836.

"GENTLEMEN,

Please to deliver the 27 pockets Playsted and the 4 pockets Selmes 1836, Sussex, to Mr. Robert Pearson or bearer to be carted to Stanton's Wharf: 20 pockets of Playsted to be forwarded per first ship and the remaining eleven pockets per the second ship and you will oblige gentlemen your most obedient

JOHN DODGSON."

The Court were unanimously of opinion that the first paper was signed by the defendant, which disposed of the case [notwithstanding the fact of his keeping it was a clear indication that he never intended it as a voucher of his being bound, but only to bind the other party (*y*)]; but Lord Abinger said, "If it depended on the "recognition of the contract by the letter, there might be some "doubt, though even upon that I should have thought the reference to the only contract proved in the case sufficient." Parke,

(*x*) *Johnson* v. *Dodgson*, 2 M. & W. 653.
(*y*) *Per* Blackburn, J., in *Durrell* v. *Evans*, 1 H. & C. 191; 31 L. J. Ex. 337.

B., said, "If the question turned on the recognition by the subse-"quent letter, I own I should have had very considerable doubt "whether it referred sufficiently to the contract. It refers to the "subject matter, but not to the specific contract" (*z*).

In *Allen* v. *Bennett* (*a*), in 1810, there was a contract note defective from not giving the name of the purchaser; there was also a correspondence between the parties which is not set out in the report. It appears, however, to have shown that there was a contract of sale of some sort between the parties concerning goods of the same sort as those mentioned in the contract note, and to have been in itself defective as a memorandum, and to have made no specific allusion to the *contract note. The Common Pleas held, [*50] that the correspondence was sufficiently connected with the note, and supplied its deficiencies.

[In *Buxton* v. *Rust*, (*b*), in 1872, the purchaser handed to the vendor a memorandum of the terms of the bargain. The vendor did not sign it and some time afterwards wrote to the purchaser saying that he should "consider the deal off, as you have not com-"pleted your part of the contract." The purchaser then asked for a copy of the memorandum, which the vendor enclosed in a letter signed by him. Held, that these letters and enclosures were sufficiently connected to form a memorandum.]

Jackson v. *Lowe* (*c*), *Cooper* v. *Smith* (*d*), *Richards* v. *Porter* (*e*), *Smith* v. *Surman* (*f*), are cases which turn upon the sufficiency or not of what was written, and not upon the circumstance of its being contained in different documents.

What is a sufficient memorandum.

Supposing the writing to be all on one paper, or on papers sufficiently connected, the question arises whether there is sufficient matter to form a note or memorandum of the bargain. It was decided in *Wain* v. *Warlters* (*g*), in 1804, that a writing could not be a memorandum of an agreement within the *fourth* section of the Statute of Frauds, unless it contained the whole agreement, that is to say, the parties and the consideration and the subject matter as well as the promise. The decision was a good deal questioned at first, but it seems now well established as law.

(*z*) See also *Archer* v. *Baynes*, 5 Ex. 625, in 1850; 20 L. J. Ex. 54.

(*a*) *Allen* v. *Bennet*, 3 Taunt. 169.

(*b*) *Buxton* v. *Rust*, L. R. 7 Ex. 1, and 279; 41 L. J. Ex. 1, and 173. See also *Bauman* v. *Jones*, 3 Ch. Ap. 508; *Long* v. *Millar*, 4 C. P. D. 450; *Cave* v. *Hastings*, 7 Q. B. D. 125; *Bonnewell* v. *Jenkins*, 8 Ch. D. 70.

(*c*) *Jackson* v. *Lowe*, 1 Bing. 9.

(*d*) *Cooper* v. *Smith*, 15 East, 103.

(*e*) *Richards* v. *Porter*, 6 B. & C. 437.

(*f*) *Smith* v. *Surman*, 9 B. & C. 561.

(*g*) *Wain* v. *Warlters*, 5 East, 10; *Price* v. *Richardson*, 15 M. & W. 539; 15 L. J. Ex. 345.

The words in the seventeenth section of the statute are substan- [*51] tially the same as those in the fourth, except that the *word "bargain" is used instead of the word "agreement." The two words seem to be very much alike in their meaning; indeed, so long as the property in the goods is not transferred, a contract for the sale of goods is more technically and accurately called an agreement than a bargain; but the difference in the words should be observed as it has been twice said by learned Judges, that it may make a difference in the construction of the section.

It is necessary that the memorandum should disclose who the person is with whom the contract is made, as well as the person to be charged by it, otherwise it is no memorandum of the bargain.

This seems to have been first decided in *Champion* v. *Plummer* (*h*), in the Common Pleas in 1805. In that case, the plaintiff's clerk, at the time of the verbal bargain wrote an entry in the following words: "Bought of W. Plummer 20 puncheons of treacle, 37*l.* 10*s.*, to be delivered by 10th December." Plummer then signed it. The Common Pleas held that this would not make the contract good as against Plummer. Sir J. Mansfield, C. J., said, "How can that be "said to be a memorandum of a contract which does not state who "are the contracting parties. By this note it does not at all appear "to whom the goods were sold" (*i*).

In *Allen* v. *Bennet* (*k*), in 1810, the defendant's agent wrote in a book belonging to the plaintiff, Allen, the following entry:—"Ordered of H. and G. Bennet, Liverpool, 50 barrels fine new rice, 3*l.*, 2 months and 2 months as per sample in running numbers," and signed it on the defendant's (Bennet's) behalf. The name of the plaintiff, Allen, did not appear in the book, except in one place, where it had been again struck out. The Common Pleas considered this a defective memorandum, but that the deficiency was supplied by other documents (*l*).

[*52] *In *Cooper* v. *Smith* (*m*), in 1812, before the King's Bench, the entry was made by the plaintiff's agent in a book; it mentioned the defendant's name. The Court inquired particularly whether the plaintiff's name appeared anywhere in the book; it did not; but the memorandum was not signed by an agent for the defendant, and, perhaps, the decision turned more upon that than on the absence of the plaintiff's name.

In *Jacob* v. *Kirke* (*n*), in 1839, the entry was in a book of the plaintiff's in the following terms:—"Mr. Kirke, 6 dozen kings, 6 dozen queens, at 25*s.* per lb., 2 dozen others at 20*s.* per pound., to Russell Street, Manchester;" it was signed by Kirke, but Jacob's

(*h*) *Champion* v. *Plummer*, 1 N. R. 252.
(*i*) See also *Williams* v. *Lake*, 29 L. J. Q. B. 1; 2 E. & E. 349.
(*k*) *Allen* v. *Bennet*, 3 Taunt. 169.
(*l*) See also *Sarl* v. *Bourdillon*, 1 C. B. N. S. 188; 26 L. J. C. P. 78, *ante* p. 46.
(*m*) *Cooper* v. *Smith*, 15 East, 103.
(*n*) *Jacob* v. *Kirke*, 2 M. & R. 222.

name nowhere appeared in the book. Parke, J., at Nisi Prius, thought the objection under the Statute of Frauds unsurmountable, but the case went off on another point.

[In *Graham* v. *Musson* (*o*), in 1839, the plaintiff's traveller, Dyson, sold some sugar to the defendant, and made an entry in the defendant's book which he signed with his own name, Dyson. There was no evidence that Dyson was authorized to act as the defendant's agent, and the Court held that the plaintiff could not recover.

In *Vandenbergh* v. *Spooner*(*p*), in 1866, the defendant signed this memorandum:—"D. Spooner agrees to buy the whole of the lots of marble purchased by Mr. Vandenburgh, now lying at Lyme Cobb, at 1*s*. per foot." Held that this was not a sufficient memorandum. As Bramwell, B., put it, "The seller's name as seller is not men-"tioned in it, but occurs only *as part of the description* of the "goods."

In *Newell* v. *Radford* (*q*), in 1867, which was an action for not delivering; the memorandum was "Mr. Newell, 32 sacks culasses at 39*s*., 280 lbs., to await orders. June 8. *John Wil- [*53] liams." Williams was the defandant's agent, and it was said for the defendant that there was nothing to show who was the buyer and who was the seller. But evidence had been given that Newell was a baker and Radford a flour merchant, and the Court held that this evidence was admissible and removed the uncertainty.

In this case Willes, J., threw some doubt on *Vandenbergh* v. *Spooner* (*r*); he considered the memorandum in that case amounted in effect to such a memorandum as this. "A. agrees to buy B.'s "horse for 10*l*." The words were, "A. agrees to buy the horse purchased by B., for 10*l*." And the two appear to be the same, for the words "purchased by" may be read merely as showing how the horse came to be B.'s. If the wording in *Vandenbergh* v. *Spooner* (*r*) had been "A. agrees to buy a horse for 10*l*. B.," there would have been a fuller memorandum than in *Newell* v. *Radford* (*s*), and it would have been held sufficient by the Common Pleas. It seems difficult to see how the words "A. agrees to buy the horse purchased by B. for 10*l*." are less sufficient.

In *Sharman* v. *Brandt* (*t*), in 1871, the plaintiff was a broker, and was authorized by the defendants to purchase hemp for them. The plaintiff carried on business alone, under the style of Simpson & Co. The contract note was as follows: "Bought for Messrs. "Brandt and Horny, of our principals, 200 tons, &c. W. W.

(*o*) *Graham* v. *Musson*, 5 Bing. N. C. 603. See also *Graham* v. *Fretwell* in 1841, 3 M. & G. 368.

(*p*) *Vandenbergh* v. *Spooner*, L. R. 1 Ex. 316; 35 L. J. Ex. 201.

(*q*) *Newell* v. *Radford*, L. R. 3 C. P. 52; 37 L. J. C. P. 1.

(*r*) *Vandenbergh* v. *Spooner*, L. R. 1 Ex. 317; 35 L. J. Ex. 201.

(*s*) *Newell* v. *Radford*, L. R. 3 C. P. 52; 37 L. J. C. P. 1.

(*t*) *Sharman* v. *Brandt*, L. R. 6 Q. B. 720; 40 L. J. Q. B. 312.

Simpson & Co." The plaintiff had no principals, but was himself the seller, and on the defendants refusing to take the hemp, brought this action as principal. He was nonsuited, and the Queen's Bench and Exchequer Chamber affirmed the nonsuit, Kelly, C. B., saying "it was not a note of any contract at all between the plaintiff, as seller, and the defendants, as purchasers."]

There is no case that I am aware of, in which a memorandum that did not disclose who the parties were, has been held sufficient; so that the authorities though not numerous are uniform. But it is [*54] not necessary that the name of the *party with whom the contract is made, should be inserted, if there be on the face of the memorandum a sufficient description to show who he is.

When the party is not designated at all, it is a case of a writing on the face of it defective, as containing only part of a contract; so that it is apparent that the agreement between the parties must have been partly not reduced to writing at all. When that is the case, the common law allows the contract to be proved by the writing and by parol; so that the writing shows the terms of the contract, and the parol shows with whom the contract was made. The statute, however, is not satisfied, for though the bargain is shown, it is not in writing: But when the writing describes a party with whom the contract is made, the bargain, so far as respects that, is in writing; and the parol evidence is admitted, not as proving with whom the bargain was made, but as enabling the Court to understand the description in writing, which shows with whom it was made. This is no infringement of the Statute of Frauds; indeed, if it were, there never could be a good memorandum in writing, for in the simplest case there must be some parol evidence to apply the document (*u*).

In many cases the contract is with a firm using the partnership style, and there is no doubt that in such cases it may be shown by parol who the parties constituting that firm are, and that the contract is made with them.

It is common also for an agent who is making contracts on behalf of a principal, to enter into written agreements that on the face of them purport to be made with the agent himself, and make no mention of his having any principal; when this is the case, there might, if it were a new question, be some difficulty in seeing how this contract is to be made the contract of the principal, without directly contradicting the instrument; for on the face of it, it has a plain intelligible meaning. However, the decisions have settled, that without contradicting the writing or preventing its effect as a memorandum under the statute, evidence may be produced to show that the contract was made with the principal, either for the [*55] *purpose of enabling him to sue or be sued on the contract in his own name; and they have also settled, that evidence may *not*

(*u*) *Sale* v. *Lambert*, L. R. 18 Eq. 1; *Potter* v. *Duffield*, L. R. 18 Eq. 4.

be produced to show that the contract was *not* made with the agent, for the purpose of preventing his suing or being sued in his own name.

All the authorities bearing on this subject will be found collected in *Higgins* v. *Senior* (*x*), decided in 1841. In that case, in the Exchequer, after taking time to consider, the judgment of the Court was delivered by Parke, B., who said, "There is no doubt that "where such an agreement is made, it is competent to shew that "one or both of the contracting parties were agents for other per-"sons and acted as such agents in making the contract, so as to "give the benefit of the contract on the one hand to, and charge "with liability on the other, the unnamed principal, and this, "whether the agreement be or be not required to be in writing by "the Statute of Frauds, and this evidence in no way contradicts "the written agreement. It does not deny that it is binding on "those whom, on the face of it, it purports to bind, but shews that "it also binds another, by reason that the act of the agent in sign-"ing the agreement in pursuance of his authority, is, in law, the "act of the principal. But, on the other hand, to allow evidence "to be given that the party who appears on the face of the instru-"ment to be personally a contracting party, is not such, would be "to allow parol evidence to contradict the written agreement which "cannot be done." *Higgins* v. *Senior* (*x*) was a case in which the agent who had contracted in his own name, sought to discharge himself and was not permitted to do so (*y*). Almost *at the [*56] same time, the Queen's Bench, in *Trueman* v. *Loder* (*z*), allowed parol evidence to charge the principal with a contract made in the name of his agent. That was a sale of goods; the bought and sold notes which were made use of to make out the contract were headed, "Bought for Messrs. Trueman and Co." (the plaintiffs) and "Sold for Mr. G. Higginbotham." The Court thought it proved that Higginbotham was acting as agent for Loder and Co., the defendants, and that the broker's notes were a sufficient memorandum of a bargain between them and Trueman. "Among the ingenious "arguments pressed by the defendant's counsel," said Lord Denman, in delivering judgment, "there was one which it may be fit to "notice; the supposition that parol evidence was introduced to "vary the contract, shewing it not to have been made by Higgin-

(*x*) *Higgins* v. *Senior*, 8 M. & W. 834; 11 L. J. Ex. 199.

(*y*) *Franklyn* v. *Lamond*, in 1847, 4 C. B. 637; 16 L. J. C. P. 221; *Kelner* v. *Baxter*, in 1866, L. R. 3 C. P. 174; 36 L. J. C. P. 94; *Paice* v. *Walker*, in 1870, L. R. 5 Ex. 173; 39 L. J. Ex. 109; *Die Elbinger Co.* v. *Claye*, in 1873, L. R. 8 Q. B. 313; 42 L. J. Q. B. 151; *Hutton* v. *Bulloch*, in 1874, L. R. 9 Q. B. 572; *Southwell* v. *Bowditch*, in 1876, L. R. 1 C. P. D. 374; 45 L. J. C. P. 374; *Gadd* v. *Houghton*, in 1876, L. R. 1 Ex. D. 357; 46 L. J. Ex. 71; *Hutcheson* v. *Eaton*, in 1884, L. R. 13 Q. B. D. 861; *Calder* v. *Dobell*, in 1871, L. R. 6 C. P. 486; 40 L. J. C. P. 89—224; *Curtis* v. *Williamson*, in 1874, L. R. 10 Q. B. 57; 44 L. J. Q. B. 27.

(*z*) *Trueman* v. *Loder*, 11 A. & E. 589.

"botham, whose name is inserted in it, but by the defendant, who "gave him the authority. Parol evidence is always necessary to "shew that the party sued is the party making the contract and "bound by it; whether he does so in his own name or in that of "another or in a feigned name, and whether the contract be signed "by his own hand or that of an agent, are inquiries not different in "their nature from the question, who is the person who has just "ordered goods in a shop. If he is sued for the price, and his "identity made out, the contract is not varied by appearing to have "been made by him in a name not his own."

It may, therefore, be taken as a general rule, that a writing is not a sufficient memorandum of the bargain, unless it describes the party with whom the bargain is made, though the description need not be by his own name; but it is not quite so clearly settled what more is necessary.

As has been already observed (*a*), a memorandum of an agreement within the 4th section must contain the subject matter of the [*57] agreement and the consideration as well as the *promise; but the word in the 17th section is "bargain," not "agreement," and though it seems difficult to see wherein bargain is a word less extensive in its meaning than agreement, it has been thought that there is a difference.

In *Egerton* v. *Matthews* (*b*), A. D. 1805, the writing was in the following terms:—"We agree to give Mr. Egerton 19*d.* per lb. for thirty bales Smyrna cotton, customary allowance cash 3*l.* per cent. as soon as our certificate is complete." It was signed by the defendants. The plaintiff was nonsuited by Lord Ellenborough, on the ground that this was not a sufficient memorandum within the statute. The nonsuit was set aside, and Lord Ellenborough is said to have declared that he had directed the nonsuit without attending to the difference between the wording of the 4th section and of the 17th section. And that the writing was a "memorandum of the "bargain or at least so much of it as was sufficient to bind the "parties to be charged therewith." There is some difficulty in understanding what was the objection to the memorandum as a memorandum of an agreement, and consequently it is difficult to say what the distinction was which Lord Ellenborough made between bargain and agreement, but it appears that he made some distinction.

In *Laythoarp* v. *Bryant* (*c*), in 1836, which was a case on the 4th section, Tindal, C. J., said, "*Wain* v. *Warlters* (*d*), was decided "on the express ground that an agreement under the 4th section "imports more than a bargain under the 17th."

(*a*) *Ante*, p. 50.
(*b*) *Egerton* v. *Matthews*, 6 East, 307.
(*c*) *Laythoarp* v. *Bryant*, 2 N. C. 735.
(*d*) *Wain* v. *Warlters*, 5 East, 10.

In *Marshall* v. *Lynn* (*e*), in 1840, Alderson, B., said, "By the "4th section of the Statute of Frauds it is provided, that the con- "tracts therein mentioned shall be in writing, otherwise no action "shall be maintained upon them. The 17th section requires that "some note or memorandum in writing of the bargain before made "shall be signed by the party to be charged by such contract, or "his agent lawfully *authorised. There is, undoubtedly, a [*58] "distinction between the two enactments, for by the 4th section "the whole contract must be in writing, including the consideration, "which induced the party to make the stipulation by which he "is to be bound; but by the 17th section it is sufficient if all the "terms by which the defendant is to be bound are stated in writing, "so as to bind him."

These two last authorities are certainly no more than dicta irrelevant to the cases in which they were spoken; but though they are not supported by any decisions that I am aware of, they are not contradicted by any cases either. It may seem strange that the point has not been decided, but the truth is, it is not of such practical importance as it seems.

When a writing containing the terms by which one party is to be bound in a contract of sale, and signed by him, is within the knowledge of the other, so that he can make use of it to bind the contract, it is in very many cases a reduction of the terms of the agreement to writing, such that no objection can be made to it as not containing the whole of the bargain, because by the rules of law it is conclusive as to what the bargain is. The terms that are not in it *cannot* be part of the bargain.

And even when the circumstances under which the writing was made are such as to make it not more than evidence of the agreement, it is a difficult thing for a party to prove that a written admission signed by himself does not contain the whole truth. The jury would properly be very unwilling to find that the writing did not contain the whole agreement unless there was some good reason given to explain the inaccuracy.

The question, therefore, can seldom arise except where there is a letter written for some collateral purpose, and alluding incidentally to the bargain. It is most natural in such cases that the letter writer should only recite so much of the contract as is material to the main subject of his letter, so that he has no great difficulty in establishing the fact that part of the terms are omitted.

*There are several cases of this sort, but none in which the [*59] writing was a complete memorandum of those terms of the bargain to which the party signing it was bound, but omitted material parts of the engagement of the other party.

In *Cooper* v. *Smith* (*f*), in 1812, there had been a parol sale of

(*e*) *Marshall* v. *Lynn*, 6 M. & W. 109; 9 L. J. Ex. 127.
(*f*) *Cooper* v. *Smith*, 15 East, 103.

flour for a price exceeding 10*l.* The plaintiff, who was the vendor, more than a week after the contract, sent to the defendant an invoice specifying the goods and their price, accompanied by this note:—"Sir, the above was yesterday forwarded by Smith and Son's boat, which I have no doubt will be with you very soon." The defendant wrote next day, apparently in answer to this note:—"Mr. Cooper, Sir, Your not coming or sending the flour I agreed with you for according to time, I am now provided for, therefore it will not suit me to receive yours, as the price is lower. I have been offered flour a great deal lower this day. I expected yours in the course of a week from the time you were at my house. If I buy of any man I expect it according to time, or the bargain is void." The plaintiff's witnesses proved, to the satisfaction of the jury, that there was no term in the contract about the flour being sent within a week, and that it was sent in a reasonable time. The King's Bench held that this letter was not a sufficient memorandum. Lord Ellenborough said, ["The plaintiff cannot avail himself of "that letter as evidence of the contract for one purpose, to bind the "defendant with the statute, and renounce it for another purpose; "but he must take it altogether; and then it] falsifies the contract "proved by parol testimony for the plaintiff."

In *Elmore* v. *Kingscote* (*g*), in 1826, there was a sale by word of mouth on the 13th June of a horse, warranted five years old, for 200 guineas. To take the case out of the Statute of Frauds, the plaintiff relied on a letter which was written and signed by the defendant, and sent to the plaintiff on the 18th June in the following [*60] terms:—"Mr. Kingscote *begs to inform Mr. Elmore, that if the horse can be proved to be five years old on the 13th of this month in a perfectly satisfactory manner, of course he shall be most happy to take him, and if not most clearly proved, Mr. K. will most decidedly have nothing to do with him." The plaintiff was nonsuited by Chief Justice Abbott, and the King's Bench confirmed the nonsuit, because the price was a material part of the bargain. The plaintiff's counsel contended, that there being no mention of the price in the letter, the law would imply that a reasonable price was to be paid. Probably this would have sufficed if the real contract had not been for a fixed sum; and if the note had been written whilst the bargain was being made, the defendant would perhaps have been bound to a bargain for a reasonable price; but the note was evidently written after the bargain was complete, and in consequence of a dispute about the warranty, so that the defendant had no difficulty either in law or fact in establishing that there was a specific price which he had made no mention of in his letter, because it was immaterial to the question of warranty concerning which it was written. The Court, however, are not reported to have given their reasons for overruling this last objection.

(*g*) *Elmore* v. *Kingscote*, 5 B. & C. 583.

In *Acebal* v. *Levy* (*h*), in 1834, there was a verbal contract for the sale of a shipload of nuts, to be put on board by the plaintiffs at Gijon, in Spain, and to be paid for by the defendants at the then shipping price at Gijon. There was a correspondence between the parties about the transfer of the charter of a vessel, in the course of which it appeared that the ship was to be loaded with nuts for the defendant, but there was no mention whatever of the price. The plaintiff's counsel contended that the law would imply a contract to pay a reasonable price. The Common Pleas decided that this correspondence was no memorandum of the contract actually made, for even if the law would imply from the correspondence that the nuts were to be paid for at a reasonable price, the parol evidence showed that they were to be sold at the *shipping price at [*61] Gijon, which was by no means necessary a reasonable price. In delivering judgment, Tindal, C. J., said, "In order to recover on "the count for goods bargained and sold a sufficient note or memo-"randum of the contract of sale at a reasonable price is just as ne-"cessary as on the special count, but for the reasons already given, "the note produced cannot prove a sale at a reasonable price where "it is silent altogether as to price, and the parol evidence shows a "different contract to have been made."

In *Hoadley* v. *McLean* (*i*), in 1834, the defendant wrote to the plaintiff on the 15th May, 1832. "Sir Arch. McLean orders Mr. Hoadley to build a new, fashionable and handsome laundaulet (here followed a minute description of it), the whole to be ready by the 1st March, 1833." No price was ever agreed upon between the parties, and upon the laundaulet being finished they quarrelled about what was a reasonable price; the jury, who were the proper judges of the fact, found that 480*l.*, which Hoadley demanded, was very reasonable. The Common Pleas considered the order a sufficient memorandum: Tindal, C. J., said, "What is implied by "law is as strong to bind the parties as if it were under their hand. "This is a contract in which the parties are silent as to price, and "therefore leave it to the law to ascertain what the commodity con-"tracted for is reasonably worth (*k*)."

It is to be observed, that in *Hoadley* v. *McLean* (*i*), there was no attempt to show that a specific price was agreed upon; but it is very doubtful whether the law would have permitted any parol evidence to show that there was such a term in the bargain, for the order sent by Sir Archibald seems to have been the written bargain irself. It is clear that in *Cooper* v. *Smith* (*l*), and *Elmore* v. *Kingscote* (*m*), the writings were not the agreements, but only admissions of

(*h*) *Acebal* v. *Levy*, 10 Bing. 376.
(*i*) *Hoadley* v. *McLean*, 10 Bing. 482.
(*k*) See also *Ashcroft* v. *Morrin*, 4 M. & G. 450; and *Valpy* v. *Gibson*, 4 C. B. 837; 16 L. J. C. P. 241.
(*l*) *Cooper* v. *Smith*, 15 East, 103.
(*m*) *Elmore* v. *Kingscote*, 5 B. & C. 583.

some of the terms of agreements previously made: and probably [*62] in **Acebal* v. *Levy* (*n*) the mention of the terms of the bargain was but incidental, though the report scarcely furnishes means of judging of that. [In *Goodman* v. *Griffiths* (*o*), in 1857, the memorandum was held in sufficient because the price which had been agreed upon was not mentioned.]

It is very clear that all those cases in which the memorandum was held defective the omissions very materially qualified the defendant's liability, and therefore these decisions are not contradictory of the dictum of Alderson, B., in *Marshall* v. *Lynn*, (*p*), but there is nothing in the language of the different Judges who decided them to show that any distinction was present to their minds between a memorandum sufficient to charge the one party and a memorandum sufficient to charge the other. And it does seem an unnecessary multiplying of subtleties to hold that a writing in the very same terms should be a memorandum of the bargain when used by the bargainee, and cease to be one when used by the bargainor, and that inconvenience is avoided by adopting the definition of Holroyd, J., in *Kenworthy* v. *Schofield* (*q*), viz., "It appears to "me that you cannot call a memorandum of a bargain which does "not contain the terms of it."

It sometimes happens that after a dispute has arisen, a party in a letter signed by him recapitulates the whole terms of the bargain, for the purpose of saying that the bargain is at an end for some reason which is evidently insufficient in law. It has never been decided whether such an admission of the terms of the bargain signed for the express purpose of repudiation can be considered a memorandum to make the contract good; but it seems difficult on principle to see how it can be so considered. The parties may either of them put an end to the contract at any time whilst it is not good, with cause or without cause, and a memorandum of the terms comes [*63] *too late to make a contract good which is already put an end to. There is evidently a great difference between a writing which, after the dispute has arisen, mentions the terms of the contract for the purpose of showing that the bargain is at an end, and one which recognizes them as still subsisting. [Since this passage was written the point has been decided (*r*), and it is now law that a letter written for the purpose of repudiating a contract may be good as a memorandum.] I know only of three cases in which this point could have been decided; and though in each of them the memorandum was held insufficient, they seem to have been decided on special grounds.

(*n*) *Acebal* v. *Levy*, 10 Bing. 376.

(*o*) *Goodman* v. *Griffiths*, 1 H. & N. 574; 26 L. J. Ex. 145. See also *Lockett* v. *Nicklin*, 2 Ex. 93; 19 L. J. Ex. 403, 1848; *Peirce* v. *Corf*, L. R. 9 Q. B. 210; 43 L. J. Q. B. 52.

(*p*) *Marshall* v. *Lynn*, 6 M. & W. 109; 9 L. J. Ex.127.

(*q*) *Kenworthy* v. *Schofield*, 2 B. & C. 948.

(*r*) See *Bailey* v. *Sweeting*, *post*, p. 64; 9 C. B. N. S. 843; 30 L. J. C. P. 150.

In *Cooper* v. *Smith* (*s*), in 1812, which has been already cited (*t*), the decision of the Court seems to have turned on the fact of the note containing terms materially different from those of the bargain declared on and proved.

In *Richards* v. *Porter* (*u*), in 1827, the defendant wrote to the plaintiffs: "The hops, five pockets, which I bought of Mr. Richards on the 23rd of last month are not yet arrived, nor have I ever heard of them. I received the invoice. The last was much longer than they ought to have been on the road; however, if they do not arrive in a few days I must get some elsewhere." The plaintiffs were nonsuited, and the King's Bench held the nonsuit right. Lord Tenterden said, "I think this letter is not a sufficient note or "memorandum in writing of the contract to satisfy the Statute of "Frauds. Even connecting it with the invoice, it is imperfect. If "we were to decide that this is a sufficient note in writing, we "should in effect hold, that if a man were to write and say, 'I have "'received your invoice, but I insist upon it the hops have not been "'sent in time,' that would be a note or memorandum sufficient to "satisfy the statute. I think the case of *Cooper* v. *Smith* (*s*) in "substance is not distinguishable from this" (*x*).

*In *Smith* v. *Surman* (*y*), in 1829, the plaintiff's attorney [*64] wrote to the defendant, "Sir, I am directed by Mr. Smith, of Norton Hall, to request you will forthwith pay for the ash timber which you purchased of him. The trees are numbered from 1 to 19, and contain on a fair admeasurement 229 feet, 7 inches. The value at 1*s.* 6*d.* per foot amounts to 17*l.* 3*s.* 6*d.* I understand your objection to complete your contract, is on the ground that the timber is faulty and unsound, but there is sufficient evidence to show that the same timber is very kind and superior, and a superior marketable article. I understand you object to the manner in which the trees were cross cut, but there is also evidence to prove they were so cut by your direction. Unless the debt is immediately discharged, I have instructions to commence an action against you." The defendant wrote in answer, "Sir, I have this moment received a letter from you, respecting Mr. Smith's timber, which I bought of him at 1*s.* 6*d.* per foot, to be sound and good, which I have some doubt whether it is or not; but he promised to make it so, and now denies it. When I saw him, he told me I should not have any without all, so we agreed upon those terms, and I expected him to sell it to somebody else." This was held not a sufficient note or memorandum of the bargain. Bayley, J., seems to have formed his judgment, partly because the vendee did not recognise the bargain as a binding bargain: the other two judges, Littledale and Park, only say that the letters were inconsistent.

(*s*) *Cooper* v. *Smith*, 15 East, 103.
(*t*) *Ante*, p. 59.
(*u*) *Richards* v. *Porter*, 6 B. & C. 437.
(*x*) See also *Archer* v. *Baynes*, 5 Ex. 625; 20 L. J. Ex. 54.
(*y*) *Smith* v. *Surman*, 9 B. & C. 561.

[In *Bailey* v. *Sweeting* (*z*), in 1861, the defendant verbally ordered of the plaintiffs some chimney glasses to be paid for in cash, and some other goods on credit. When the chimney glasses arrived they were in a damaged state and the defendant refused to accept them. He wrote to the plaintiffs, "I beg to say that the only parcel of goods selected for ready money was the chimney glasses, amounting to 38*l.* 10*s.* 6*d.*, which goods I have never received, and have long since declined to have." The defendant paid [*65] the price of the other *goods into court. And the jury having found that the contract for the chimney glasses was a separate one, the Court, consisting of Erle, C. J., Williams, Willes and Keating, JJ., held that the letter, although written for the purpose of repudiating the contract, was a sufficient memorandum, and that the plaintiffs were entitled to recover.

In *Wilkinson* v. *Evans* (*a*), in 1866, the seller sent some cheeses and candles to the buyer and an invoice "in the usual form," the buyer sent them back with a note signed by himself on the back of the invoice, "The cheese came to-day, but I did not take them in for they were very badly crushed; so the candles and cheese is returned." The seller was nonsuited on the ground that there was no sufficient memorandum. On the motion for a new trial it was argued for the buyer that the invoice was no evidence of a sale, for the goods might possibly have been sent on approval. But the Court ordered a new trial on the ground that the indorsement on the invoice was a statement of an objection not to the terms of the contract as there set out, but to the manner in which it had been performed, and was therefore some evidence of a contract (*b*).

In *Godwin* v. *Francis* (*c*), in 1870, it was held that a telegram sent by the defendant was a sufficient memorandum.

A mere proposal with proof of parol acceptance is sufficient.

In *Reuss* v. *Picksley* (*d*), in 1866, where a proposal in writing signed by the defendant had been assented to by the plaintiff by parol, and contained the names of the parties and all the other terms of the bargain, the Court held that it was a sufficient memorandum, following *Warner* v. *Willington* (*e*) and *Smith* v. *Neale* (*f*).]

[*66] **What is a signature.*

The note or memorandum must be signed by the parties to be

(*z*) *Bailey* v. *Sweeting*, 9 C. B. N. S. 843; 30 L. J. C. P. 150.

(*a*) *Wilkinson* v. *Evans*, L. R. 1 C. P. 407; 35 L. J. C. P. 224; 41 L. J. Ex. 1 and 173.

(*b*) *Buxton* v. *Rust*, 7 Ex. 1 and 279; *Leather Cloth Co.* v. *Hieronimus*, L. R. 10 Q. B. 140; 44 L. J. Q. B. 54.

(*c*) *Godwin* v. *Francis*, L. R. 5 C. P. 295; 39 L. J. C. P. 121.

(*d*) *Reuss* v. *Picksley*, L. R. 1 Ex. 342; 35 L. J. Ex. 218.

(*e*) *Warner* v. *Willington*, in 1856, 25 L. J. Ch. 662.

(*f*) *Smith* v. *Neale*, in 1857, 26 L. J. C. P. 143; 2 C. B. N. S. 67; see also *Liverpool Bank* v. *Eccles*, in 1859, 4 H. & N. 139; 28 L. J. Ex. 122.

charged by the contract, or their agent thereunto lawfully authorised. If the question were now open, it might seem that the words of this section required the note or memorandum to be signed on behalf of both parties to the contract; but it is well settled, that the only signature required is a signature on behalf of that party who is sought to be charged in the proceeding in which the question rises. The effect of this is, that when the memorandum is signed by one party only, the contract is good or not at the election of the other. Whether those who framed the statute contemplated such a result, may well be doubted, but it is too late to raise the question. In *Allen* v. *Bennet* (*g*), in 1810, the objection was made; but even then the Common Pleas treated the question as one conclusively settled by inveterate practice. "All these cases," said Sir J. Mansfield, "*Egerton* v. *Matthews* (*h*), *Saunderson* v. "*Jackson* (*i*), and *Champion* v. *Plummer* (*k*), suppose a signature "by the seller to be sufficient, and every one knows it is the daily "practice of the courts of Chancery to establish contracts signed "by one person only, and yet a court of equity can no more dispense "with the Statute of Frauds than a court of law." Since the decision of that case, uniform practice has further confirmed this construction.

A curious question was made in the following case as to the effect as to third persons of a contract of sale, good as against the one party who had signed a memorandum, but not binding on the other party who had not either repudiated or confirmed the contract.

The case was *Coates* v. *Chaplin* (*l*), in 1842. The plaintiffs, *Coates and Co., verbally agreed to sell goods above the [*67] value of 10*l.* to Morrison and Co.; they sent them by the defendants, who were carriers. The goods were lost on the way, and the question was, who should bring the action against the carriers, Coates or Morrison? In general, the proper party to sue a carrier for negligence is the owner of the damaged goods. In this case, at the time of the loss the contract of sale was good against Coates and Co., who had sent Morrison and Co. a letter containing an invoice; but good or not against Morrison and Co. at their election; but at the time of the loss they had exercised no election. The Queen's Bench decided the case on the narrow ground that there was no distinct evidence that Coates and Co. had any authority from Morrison and Co. to employ a carrier at all; but probably they would, if necessary, have held that the property was not changed (as against third parties) till the sale was binding on both vendor and vendee (*m*).

(*g*) *Allen* v. *Bennet*, 3 Taunt. 169.
(*h*) *Egerton* v. *Matthews*, 6 East, 307.
(*i*) *Saunderson* v. *Jackson*, 2 B. & P. 38.
(*k*) *Champion* v. *Plummer*, 1 N. R. 252.
(*l*) *Coates* v. *Chaplin*, 3 Q. B. 483; 6 Jur. 1123.
(*m*) See also *Coombs* v. *Bristol and Exeter Ry. Co.*, in 1858, 3 H. & N. 510; 27 L. J. Ex. 401.

The signature to the memorandum may be the signature either of the name of the party himself, or of the name of his agent (*n*). There is no more objection to showing that the signature of the agent's name is meant as the signature of the principal, than to showing that a contract purporting to be made with the agent is made with the principal, and that may always be done.

The signature of the name may be in writing or in print, and it is immaterial in what part of the document it appears, provided there are circumstances to show that it was appropriated by the party to the authentication of the contract. This is perhaps a more lax interpretation of the words of the statute than is altogether satisfactory, but it seems well established.

[It is a signing and not a subscribing which the statute requires [*68] (*o*): and it matters not whether the signature is at *the beginning, in the middle, or at the end of the document (*p*)].

Perhaps the case of *Saunderson* v. *Jackson* (*q*), in 1800, may be considered as the extreme limit to which this doctrine has been carried. In that case there was a bill of parcels with a printed heading, "Bought of Jackson and Hankin," the names of the defendants: the blanks in it were filled up with the name of the plaintiff and the quantity and price of the goods bought; it was then delivered to the plaintiff. Lord Eldon, C. J., said, "The "single question is, whether, if a man be in the habit of printing "instead of writing his name, he may not be said to sign by his "printed name as well as by his written name. * * * It has been "decided that if a man draw up an agreement in his own hand-"writing, beginning, I, A. B., agree, &c., and leave a place for a "signature at the bottom, but never sign it, it may be considered "as a note or memorandum in writing within the statute, and yet "it is impossible not to see that the insertion of the name at the "beginning was not intended to be a signature, and that the paper "was meant to be incomplete until it was further signed. This "last case is stronger than the one now before us, and affords an "answer to the argument that this bill of parcels was not delivered "as a note or memorandum of the contract."

In *Schneider* v. *Norris* (*r*), in 1814, there was a similar invoice, with "Bought of Norris and Co." printed on it; the body of it was filled up in the handwriting of Norris. The King's Bench held this a document signed by Norris. Lord Ellenborough said, "I "cannot but think that a construction which went the length of "holding that in no case a printing, or any other form of signature, "could be substituted in lieu of writing, would be going a great

(*n*) *White* v. *Proctor*, 4 Taunt. 209.

(*o*) *Per* Lord Westbury in *Caton* v. *Caton*, in 1867, L. R. 2 H. L. 142; 36 L. J. Ch. 891.

(*p*) *Per* Blackburn, J., in *Durrell* v. *Evans*, in 1862, 1 H. & C. 191; 31 L. J. Ex. 337.

(*q*) *Saunderson* v. *Jackson*, 3 B. & P. 238.

(*r*) *Schneider* v. *Norris*, 2 M. & S. 286.

"way, considering how many instances may occur in which the "parties contracting are unable to sign. If, indeed, this case had "rested merely *on the printed name, unrecognized by and [*69] "not brought home to the party as having been printed by him, or "by his authority, so that the printed name had been unappropriat-"ed to the particular contract, it might have afforded some doubt "whether it would not be intrenching on the statute to have "admitted it; but here there is a signing by the party to be "charged by words, recognising the printed name as much as if he "had subscribed his mark to it, which is strictly the meaning of "signing, and by that the party has incorporated and avowed the "thing printed to be his; and it is the same in substance as if he "had written Norris and Co. with his own hand. He has by his "handwriting in effect said, I acknowledge what I have written to "be for the purpose of exhibiting my recognition of the within con-"tract. It appears to me, therefore, that the printed name thus "recognised is a signature sufficient to take this case out of the "statute."

In *Johnson* v. *Dodgson* (*s*), in 1837, the defendant who was the purchaser at the time of making the contract wrote in his pocket-book an entry, beginning, "Sold John Dodgson," and containing the terms of the bargain. He requested the plaintiff's traveller to sign this entry, which he did; Dodgson retained the book in his own possession. The Exchequer held this a memorandum, signed by Dodgson. Lord Abinger said, "The cases have decided that al-"though the signature be in the beginning or middle of the instru-"ment, it is as binding as if at the foot of it; the question being "always open to the jury whether the party not having signed it "regularly at the foot meant to be bound by it as it stood, or "whether it was left so unsigned because he refused to complete it. "But when it is ascertained that he meant to be bound by it as a "complete contract, the statute is satisfied, there being a note in "writing showing the terms of the contract, and recognised by him." Parke, B., said, "The point is in effect decided by the cases of "*Saunderson* v. **Jackson* (*t*), and *Schneider* v. *Norris* (*u*). [*70] "There the bill of parcels was held to be a sufficient memorandum "in writing, it being proved that they were recognised by being "handed over to the other party. Here the entry was written by "the defendant himself, and required by him to be signed by the "plaintiff's agent: this is amply sufficient to show that he meant "it to be a memorandum of the contract between the parties."

These three decisions which, considering who decided them, comprise a very great weight of authority, are perfectly consistent, but it may be observed that the principles stated in the judgment of the Exchequer are far stricter than those of Lord Eldon. He

(*s*) *Johnson* v. *Dodgson*, 2 M. & W. 653.
(*t*) *Saunderson* v. *Jackson*, 3 B. & P. 238.
(*u*) *Schneider* v. *Norris*, 2 M. & S. 286.

seems to have thought that the name of the party appearing in a document recognised by him must be a signature, whatever the intention was. The Exchequer only say it is a signature when recognised as a binding memorandum. Lord Ellenborough seems to have decided *Schneider* v. *Norris* (*x*) on the principle that the circumstances there showed that Norris had "appropriated the printed "name to the purpose of exhibiting his recognition of that par-"ticular contract," a phrase which seems to me to mark very well the difference between signing a name and merely writing it (*y*). It is to be observed, that the appropriation of the name in each of the cases was simultaneous with the completion of the instrument. It may, perhaps, be doubtful whether, if a writing containing the name of a party is complete under circumstances which show that it is not signed, it could be converted into a signed document by any subsequent parol expressions of intention whatsoever. And this is a doubt that may be of practical importance, for when one party only has signed a memorandum, which to be a memorandum of the bargain must contain the name of the other party, the contract is good or not at the election of the non-signing party. But [*71] it has never been decided (that I *know of), that the party having by word of mouth clearly and unequivocally expressed his election to hold the signer to his bargain, was more bound than before. There seems no legal reason why he may not keep the signer of the contract bound till the last moment, and then adopt or repudiate the contract as he may think most convenient for himself, or if malicious, most inconvenient for the party who has signed. If, however, a recognition of a contract containing his name is a signature, he might soon be driven either to recognise the contract, and so be bound, or to repudiate it, and so set the other side free. But though this would be just and convenient, it would be a strain upon the cases, and a very great strain upon the words of the statute.

[In the following case of *Stewart* v. *Eddowes* and *Hudson* v. *Stewart* (*z*), in 1874, the signature was upon the memorandum, but not for the purpose of recognising the contract, that recognition being a subsequent act, and it was held sufficient. There Hudson employed Eddowes to sell a ship to Stewart. An unsigned memorandum of the proposed terms was submitted to Stewart, who made some alterations in it and signed it. The alterations were subsequently struck out with his consent, and the memorandum was sent to Hudson, who made some other alterations and returned it to Eddowes, who signed it on behalf of Hudson and took it to Stewart, who acquiesced in the alterations and approved of the agreement. It was objected for Stewart in the action to recover the balance of the purchase money, that parol evidence to show that he

(*x*) *Schneider* v. *Norris*, 2 M. & S. 286.
(*y*) *Murphy* v. *Boese*, L. R. 10 Ex. 126, *post*, p. 77; 44 L. J. Ex. 40.
(*z*) *Stewart* v. *Eddowes*, *Hudson* v. *Stewart*, L. R. 9 C. P. 311; 43 L. J. C. P. 204.

had acquiesced in the contract as altered was inadmissible. But the Court held that it was admissible, Coleridge, C. J., saying, "There "was no variation of the contract, for there was no contract between "the parties until the proposal was submitted to Stewart, and Stew-"art on meeting Eddowes agreed that his handwriting should oper-"ate as a signature to what then became a complete agreement "between the parties."

*Any mark which is intended to be a signature is suffi- [*72] cient (*a*): but there must be something which is intended to be a signature; a mere description will not satisfy the statute (*b*).

And most probably a stamp intended as a signature would be sufficient, for, as Willes, J., said in *Bennett* v. *Brumfitt* (*c*), "The "using a stamp is only a compendious way of writing the party's name."

In *Geary* v. *Physic* (*d*), in 1826, Abbot, C. J., said, "There is no "authority for saying that where the law requires a contract to be "in writing, that writing must be in ink." In that case a promissory note had been indorsed in pencil.]

Who is an agent authorised to sign.

The statute is satisfied if the memorandum of the bargain is signed by the parties to be charged by the contract, or their agents thereunto lawfully authorised. There is nothing in the wording of the statute to alter the general law of agency. The agent does not require an authority in writing to enable him to sign the note, and in *Maclean* v. *Dunn* (*e*), in 1827, it was decided that in this, as well as in other cases of agency, a subsequent ratification was equivalent to a previous authority. The fact of agency may be established and any person may be proved to be an agent for this purpose, in the same manner and subject to the same rules as in cases of agency for any other purpose. It has indeed been decided that the one party cannot be an agent for the other, but this is very doubtful law. It is quite right and proper that such an unusual thing as intrusting the other side with authority should be clearly proved; but if it be clearly proved, there is nothing either in the statute or in reason to make it void.

*In *Wright* v. *Dannah* (*f*), in 1809, the plaintiff had in the [*73] presence of the defendant written down the defendant's name, the goods, and the price. The defendant looked it over, and said one of the figures was wrong. It seems clear that this was no memorandum, for the plaintiff's name did not appear, and the proof of agency was of the most meagre description. Lord Ellenborough

(*a*) *Baker* v. *Dening*, 8 A. & E. 94; *Helshaw* v. *Langley*, 11 L. J. Ch. 17.
(*b*) *Selby* v. *Selby*, 3 Mer. 2.
(*c*) *Bennett* v. *Brumfitt*, in 1867, L. R. 3 C. P. 31; 37 L. J. C. P. 35.
(*d*) *Geary* v. *Physic*, 5 B. & C. 237.
(*e*) *Maclean* v. *Dunn*, 4 Bing. 722.
(*f*) *Wright* v. *Dannah*, 2 Camp. 203.

nonsuited the plaintiff, and is reported to have said, "that the "agent must be some third person, and could not be the other contracting party."

In *Farebrother* v. *Simmons* (*g*), in 1822, the King's Bench decided that an auctioneer who had taken down the highest bidder's name, could not use this as a signature when suing in his own name, and Abbott, C. J. on the authority of *Wright* v. *Dannah* (*h*), said, "that the agent contemplated by the legislature who is to "bind a party by his signature must be some third party, and not "the other contracting party on the record." In *Wright* v. *Dannah* (*h*), Lord Ellenborough seems to have been speaking of the difficulty of establishing such an agency in fact; but in *Farebrother* v. *Simmons* (*g*) it was supposed to be impossible in law. The case was much questioned in *Bird* v. *Boulter* (*i*), but it has not yet been overruled.

[Since these passages were written the attention of the Exchequer Chamber was drawn to them in the case of *Sharman* v. *Brandt* (*k*), in 1871. That Court nevertheless decided that one party could not be the agent of the other for the purpose of signing his name, but none of the Judges gave their reasons for so holding, and some of the Judges based their decisions on another ground.]

When an agent is authorised to make a contract of sale, he has by implication authority to make it effectually, by signing the note of it; but there is no reason why a special authority should not be given to sign a particular contract, without giving any authority to [*74] make a contract or to vary *from the particular one already made. The distinction between the two sorts of agency is material; for if an agent, having authority to make a contract, makes a mistake in reducing it to writing, neither he nor his principal can show that the true contract was different, for that would be contradicting the written agreement; but if the agent had only a special authority to sign a particular contract, it is open to the principal to show that the agent has not pursued his authority.

An auctioneer is an agent having power from the vendor to sell, and having therefore incidentally authority from him to sign the contract. It is also established that the highest bidder at the sale, by the act of bidding, himself makes a contract of sale at that price subject to the conditions of sale, and gives the auctioneer authority to sign that contract so made. It was held in *Bird* v. *Boulter* (*i*), in 1833, that where the auctioneer's clerk was seen by all parties to be taking down the names of the highest bidders, he must be considered to have their authority to sign the contract.

But it is plain that neither auctioneer nor clerk has any authority from the bidder to make a contract for him. The bidder makes the

(*g*) *Farebrother* v. *Simmons*, 5 B. & Ald. 334.
(*h*) *Wright* v. *Dannah*, 2 Camp. 203.
(*i*) *Bird* v. *Boulter*, 4 B. & Ad. 443.
(*k*) *Sharman* v. *Brandt*, L. R. 6 Q. B. 623; 40 L. J. Q. B. 312.

contract himself, and all he authorises is, that the contract actually made shall then be signed. If, therefore, the auctioneer signs a contract, omitting or misstating the conditions of sale, he has not pursued his authority, and the bidder is not bound, though the contract on the face of it is complete.

These points were all decided in *Hinde* v. *Whitehouse* (*l*), in 1806. Lord Ellenborough said that whatever might have been his opinion, if the matter were new, he thought that the practice of considering an auctioneer as agent for both parties was settled; but though in that case the auctioneer had signed a memorandum on the catalogue, which Lord Ellenborough said might perhaps be a memorandum of a sale for ready money, he thought that did not bind the purchaser *who had bid subject to conditions of [*75] sale; he said, "Has the auctioneer made a memorandum of the "bargain in this case? It appears to me that he has not; the "minute made on the catalogue of sale, which is not annexed to "the conditions of sale nor has any internal reference to them by "context or the like, is a mere memorandum of the name of a "person whom, perhaps, we may intend to be the purchaser, "and of the quantity and price of the goods which we may, per-"haps, on the foot of such memorandum also intend to have been "sold to the person so named in the catalogue. But in treating it "as such memorandum throughout, we must intend also, (contrary "to the fact) that the goods were sold for ready money, and unat-"tended by the circumstances specified in the conditions of sale; "and the conditions of sale, though as unsigned, they cannot be "evidence of the bargain itself, are yet capable of being given in "evidence; and accordingly have been so, as a part of the trans-"action between the parties, and in order to show that it was on "those conditions that the goods were sold. I am of opinion "therefore that the mere writing on the catalogue, not being by any "reference incorporated with the conditions of sale, is not a mem-"orandum of a bargain under those conditions of sale."

It is, however, to be remembered, that the contract which the auctioneer has authority to sign, is that contained in the written conditions of sale exhibited at the auction, and that when such a contract is signed by the auctioneer, the purchaser cannot vary it by proof of representations or agreements entered into by word of mouth at the time of the auction (*m*).

[The case of *Bartlett* v. *Purnell* (*n*), in 1836, was rather a curious one. There the plaintiff, who was going to sell some goods by auction, owed money to the defendant, who proposed to purchase some of them, and before the auction took place they agreed that the goods purchased should be set off *against the debt. [*76] The conditions of sale stated that the goods were to be paid for on

(*l*) *Hinde* v. *Whitehouse*, 7 East, 558.
(*m*) See *Livins* v. *Shelton*, 2 Cr. & J. 446.
(*n*) *Bartlett* v. *Purnell*, 4 Ad. & El. 792.

delivery. It was argued for the plaintiff that evidence of this agreement should not have been admitted, as it went to qualify written evidence: But the Court thought it was properly admitted, for the defendant had not in fact contracted according to the conditions of sale, but according to the agreement.

Although an auctioneer has authority, while the sale is going on, by general custom recognised by the law, to sign as agent for both parties, the auctioneer's clerk has no such authority: But he may be specially authorised (*o*). *Prima facie* he is the auctioneer's agent only.

In *Mews* v. *Carr* (*p*), in 1856, the defendant called on the auctioneer the day after the sale, and asked what lots were unsold. The auctioneer pointed them out on the catalogue, and the defendant agreed to purchase some of them. The auctioneer then wrote the defendant's name opposite them. The Court held that there was no evidence that the auctioneer was the agent of the defendant to sign his name (*q*).

In *Graham* v. *Musson* (*r*), in 1839, and *Graham* v. *Fretwell* (*s*), in 1841, where a memorandum in which the plaintiff's name alone appeared, had been signed by Dyson, the plaintiff's agent, it was argued for the plaintiff that his agent had in fact signed as agent for the defendant, but the Court in both cases thought there was no evidence of it.

Blackburn, J., speaking of these cases in *Durrell* v. *Evans* (*t*), said, "The signature was that of Dyson, the agent of the seller, "put there at the request of Musson, the buyer, in order to bind "the seller; and unless the name of Dyson was used as equivalent "to Musson, there was no signature by the defendant: but in [*77] "point of fact, 'J. Dyson' was *equivalent to 'for or per pro North and Co., J. Dyson.'" The plaintiffs carried on business as North and Co.

In *Durrell* v. *Evans* (*t*), in 1862, the defendant went with the plaintiff to the premises of a hop factor named Noakes, and agreed to purchase some of the plaintiff's hops. Noakes then made a memorandum in his book beginning "Messrs. Evans bought of J. "T. and W. Noakes," &c., and dated it. At the defendant's request he altered the date, for the purpose of altering the time of payment. He then tore the memorandum from the counterfoil to which it was attached, and gave it to the defendant. The counterfoil was filled up as follows: "Sold to Messrs. Evans," &c. There was no signature by the defendant himself. Blackburn, J., in

(*o*) *Peirce* v. *Corf*, L. R. 9 Q. B. 215, in 1874; 43 L. J. Q. B. 52. See also *Gosbell* v. *Archer*, 2 Ad. & El. 500.
(*p*) *Mews* v. *Carr*, 1 H. & N. 484; 26 L. J. Ex. 29.
(*q*) See also *Graham* v. *Musson*, in 1839, 5 Bing. N. C. 603.
(*r*) *Graham* v. *Musson*, 5 Bing. N. C. 603, *ante*, p. 52.
(*s*) *Graham* v. *Fretwell*, 3 M. & G. 368, *ante*, p. 52.
(*t*) *Durrell* v. *Evans*, 1 H. & C. 174; 31 L. J. Ex. 387.

delivering judgment, said that "Noakes was not a broker who "derived his authority from the nature of his employment to sign "for both parties, and therefore the question was whether there "was any evidence that he had been authorised by the defendant "in this case to sign his name, and as the Court was of opinion "that there was *some* evidence of this, a new trial was granted" (*u*).

In *Murphy* v. *Boese* (*x*), in 1875, the plaintiff's traveller called on the defendant, and agreed for the sale of clocks. He then wrote in duplicate on a printed form headed with the plaintiff's name, the particulars of the sale and the name and address of the defendant. The defendant contended that this was nothing more than an invoice or bill, or was not a memorandum which had been signed by the traveller as his agent, and the Court, consisting of Bramwell, Pigott, and Pollock, BB., was of this opinion.]

(*u*) See also *Simmonds* v. *Humble*, 13 C. B. N. S. 258, in 1862; 9 L. T. 168.
(*x*) *Murphy* v. *Boese*, L. R. 10 Ex. 126; 44 L. J. Ex. 40.

[*78]

*CHAPTER V.

OF BROKERS, THEIR BOOKS AND NOTES, AND THEIR AUTHORITY TO SIGN A MEMORANDUM OF A BARGAIN.

It is well settled that a broker for sale is an agent, having the authority of both parties to sign a memorandum of the bargain so as to make the contract good against each.

A broker for sale is a person making it a trade to find purchasers for those who wish to sell and vendors for those who wish to buy, and to negotiate and superintend the making of the bargain between them. So far it is clear, that it is for the interest of each party that the broker should discharge his duty effectually. It does not matter which party was the first to employ the broker, the benefit of finding a customer, coming to an understanding with him, and having the contract effectually made is the same for each party. There is, therefore, nothing in the nature of his employment to prevent the broker acting for both parties to this extent.

But in practice he who employs a broker very often gives him a discretion as to the terms on which he is to sell or buy, and when this is the case the broker has to promote an interest hostile to that of the other side. The vendor seeks to sell dear, the purchaser to buy cheap, and it would be a fraud in the broker to undertake to promote at once these opposite interests; the broker, therefore, cannot act as agent for both parties in settling any of the terms of the contract, unless both parties agree to submit to him as umpire on some point. But though in exercising any discretion as to the terms of the contract, the broker must be agent for one party exclusively, there is nothing to prevent his still being agent for both parties on those points where their interests are the same. The broker who is trusted to sell at the best price he can get, must be [*79] the vendor's agent, and his only, in settling *what the price is to be; but when that is agreed upon, he may well be agent for both buyer and seller in seeing that the terms of the contract are clearly understood and made binding in law.

These considerations show the extent to which it is possible for a broker to be agent for both parties, and the practical question how far the broker actually is agent for one party or for both, depends upon actual agreement or mercantile usage. There can be no doubt that the vendor and purchaser might give the broker authority to bind them by any memorandum whatsoever, and if so they would be bound by any complete memorandum signed by him; and there can be as little doubt, that if they precribed to him a particular form in which alone he was to bind them, he could bind them by a memorandum in that form and by no other.

In the absence, however, of express directions, he who employs a broker (or indeed any other common agent) must be taken to give him authority to act for him in the manner in which such agents ordinarily do act, and the other party who treats with him has a right to assume that the broker has such authority from his principal, and to hold the principal bound by all acts of his broker not exceeding that apparent authority: if the principal did in fact limit the broker's authority more than usual, it was his business to see that the other side knew of such an unusual limitation. And in precisely the same manner the customer who enters into a contract through the medium of one whom he knows to be acting as broker for another, does by that very act apparently confer on him authority to bind the contract in the manner in which brokers do usually bind it. A person employed in the capacity of broker may have authority from his principal to bind the contract in an unusual manner, but such an authority cannot be implied from the mere relation of principal and broker, and requires to be proved by something more than the existence of that relation.

The question, therefore, is, what is the customary authority of brokers? This may seem to be a mere question of fact, and so it originally was, and still to some extent is; but *where a trade [*80] has been long established, its customs become known to the law, and are judicially taken notice of as a matter of law (*y*).

The convenience of this is obvious, for if it were necessary to prove as a matter of fact what are the customs of factors, brokers, attornies, bankers, and similar traders, on every trial in which questions concerning them arise, the delay and expense would be intolerable.

There are, however, some disadvantages attending this rule. The usage may be mistaken at first, or it may change after it has become known to the law, and when that is the case, the difference between the practical custom of trade and that which is taken as the basis of the law, renders the law uncertain. There is, too, a good deal of difficulty in knowing how far the Court does recognise a custom as a matter of law, and how far the custom still requires to be established as a fact.

There is some of this uncertainty in the law of brokers. The law, it is clear, takes notice that they are agents to bind both parties, but there is considerable difficulty in saying what are the precise limits of the broker's authority to do so. It will be seen from the cases collected that some things are well settled whilst others are still in doubt, and probably will remain in doubt till some great cause arises in which the mercantile usage can be ascertained.

The brokers in London have from the earliest times been subject to the control of the corporation. The statutes 6 Anne, c. 16, and 56 Geo. c. 60, both confirmed and limited this control.

[Although by the London Brokers Relief Act of 1870 (*z*), the

(*y*) *Barnett* v. *Brandao*, in error, 7 Scott, N. C. 327; 12 Cl. & F. 787.
(*z*) 33 & 34 Vict. c. 60.

control of the Court of Mayor and Aldermen of London over brokers has been determined, excepting the power to require brokers to be admitted, to enforce certain payments and penalties, and to remove the name of a broker guilty of fraud from the list, so that [*81] brokers may now *conduct their business free from all control of the corporation, I have thought it very desirable to retain the following passages in the original text relating to that control, for they throw considerable light on the vexed question—what is the memorandum of the contract made by a broker, and more especially as it appears to be the custom of brokers since the passing of the Act to keep a book and note the contracts in it in the same manner as they were compelled to do prior to the passing of the Act.]

The effect of those statutes was to prohibit any person from acting as broker within the city of London and its liberties unless previously admitted by the Court of Mayor and Aldermen, "under "such restrictions and limitations for their honest and good be-"haviour as that Court shall think fit and reasonable." The most important of the restrictions and limitations imposed by the Court, was that the party should execute a bond providing for his good behaviour; from 1708 to 1818, the bond was in a form, which may be found in a note to *Kemble* v. *Atkins* (*a*). Amongst other things it was conditioned, that "he shall keep a book or register, and "therein truly and fairly enter all contracts, bargains, and agree-"ments made by him within three days at the furthest after making "thereof, together with the names of the respective principals for "whom he buys or sells, and shall upon demand made by either of "the parties, buyer or seller, concerned therein, produce and show "such entry to them, to manifest and prove the certainty of such "agreements." There is no mention in the old bond of any contract notes. In the year 1818 the regulations were altered, and the amount of the bond much raised; the condition, also, was altered in several respects (*b*). The part of the new condition relating to the present subject is as follows:—"And shall keep a book or register, [*82] "intituled 'The Broker's Book,' and *therein truly and fairly "enter all such contracts, bargains, and agreements on the day of "the making thereof, together with the christian and surname at "full length of both the buyer and seller, and the quantity and "quality of the articles sold or bought, and the price of the same, "and the terms of credit agreed upon, and deliver a contract note "to both buyer and seller, or either of them, upon being requested "so to do, within twenty-four hours after such request, respectively "containing therein a true copy of such entry: And shall, upon "demand made by any or either of the parties, buyer or seller, con-

(*a*) *Kemble* v. *Atkins*, Holt, N. P. 431.

(*b*) The regulations and the bond at length may be found in the Appendix to "*Russell on Factors and Brokers.*" The bond is there somewhat inaccurately printed; the extract given here has been corrected by a reference to an original bond.

"cerned therein, produce and show such entry to them or either "of them, to manifest and prove the truth and certainty of such "contracts and agreements."

The contract notes here mentioned, which are to be a copy of the entry and delivered at any time upon request, must not be confounded with the bought and sold notes which are or ought to be made out at the time of making the contract, and generally as soon as or before it is entered in the book. There is no mention in either the bonds or regulations of the bought and sold notes.

Throughout the rest of the British empire the trade of brokers is absolutely free, any person may practise it and in any manner, subject to the customs of trade. The broker in London is also subject to the customs of trade, which are by no means identical with the regulations of the Court of Mayor and Aldermen. The statutes prohibit acting as broker in London without an admission; if, therefore, any person acts as broker without admission he acts illegally (*c*), for he breaks a statute; but if, being admitted, he transgresses the regulations, he forfeits his bond or may be dismissed from being a broker, but he does not act illegally (*d*), for he only breaks a municipal regulation.

The bond and regulations, therefore, cannot have the effect *of rendering any custom of trade illegal, or of preventing its [*83] efficacy even in London, if it does in point of fact prevail there. It is, however, not likely that any general custom should prevail in London, the observance of which would imply that brokers habitually forfeited their bonds.

These observations will be found to have some bearing on a point on which there is some difference of judicial opinion, namely, whether the entry in the broker's book, if signed by him, is in itself a sufficient memorandum of the contract signed by an agent authorized by both parties: in other words, whether the entry in the book is made as an authentic memorandum of the contract between the parties, or merely as a means for ensuring the honest and good behaviour of the broker.

As far as the regulations are concerned, it may be observed, that the Mayor and Aldermen have no authority whatever to regulate the course of dealing between buyer and seller; all that they are authorised to do, is to provide means for ensuring "the honest and "good behaviour of the broker." Had the regulations, therefore, in express terms provided that the broker should sign his book as agent for the buyer and seller, it would have conferred on him no authority to bind them, unless the buyer and seller either expressly or by usage authorised him to do so. However, on looking at the terms of the bonds it will be seen, that the regulations about the broker's book were very well framed if meant as a check upon the

(*c*) *Cope* v. *Rowlands*, 2 M. & W. 149. See also *Smith* v. *Lindo*, 4 C. B. N. S. 395; affirmed in 5 C. B. N. S. 587; 27 L. J. C. P. 196—335.

(*d*) *Ex parte Dyster*, 2 Rose, 348.

broker, but not at all artificially framed if meant to provide a means of satisfying the Statute of Frauds. Neither the old nor the new bond requires that the entry should be either written or signed by the broker, the condition would be fully complied with by an entry being made under the broker's sanction in his book by any third person and not signed at all. The old bond allowed the entry to be made at any time within three days after the contract was made, and the modern bond provides for the delivery of the contract notes at any time; so that the entries under the old bond and the notes under the new one, might well be made after the broker's authority [*84] had expired. These are not objections to *the value of the entry in the broker's book and the copies of it as evidence against the broker, but seem serious obstacles to its being used between party and party.

If, therefore, a signed entry in the broker's book be evidence between the buyer and seller, it must owe its weight not to the regulations of the Mayor and Aldermen, but to some custom to consider it as a memorandum between them. In a case in which the point was discussed (*Thornton* v. *Charles* (*e*), in 1842), Parke, B. seemed to be of opinion that such a custom was recognised as a part of the law. Lord Abinger expressed a contrary opinion, and there was no decision. In *Gregson* v. *Ruck* (*f*), in 1843, it seems to have been assumed without discussion that the bought and sold notes, exclusively of the broker's book, formed the contract: and that seems the general opinion.

A precise and accurate broker, when he has made a contract, reduces the terms to writing, and delivers to each party a copy signed by him.

The copy delivered to the seller is generally called the sold note; that which he delivers to the buyer is generally called the bought note. Besides these, he makes an entry in his book. There is no particular form requisite in the broker's bought and sold notes, but from the cases there appear to be three varieties used in practice which are substantially different.

The first is where on the face of the notes the broker professes to be acting as broker for two persons whose names are disclosed on the notes; the sold note, then, in substance is in this shape:—"Sold for A. B. to C. D.," containing the terms of the contract, and the bought note is, "Bought for C. D. of A. B.," and both are signed by the broker.

The second is where the broker on the face of the bought note professes to be, as broker, buying of some principal whose name does not appear on the bought note, and on the sold note professes [*85] to be, as broker, selling to some principal *whose name does not appear on the sold note; the notes are then in form:—"Bought for C. D.," and "Sold for A. B."

(*e*) *Thornton* v. *Charles*, 9 M. & W. 807.
(*f*) *Gregson* v. *Ruck*, 4 Q. B. 737.

These two forms seem about equally common. The reader will find instances of the first in *Powell* v. *Divett* (*g*), *Thornton* v. *Kempster* (*h*), *Hawes* v. *Forster* (*i*). There are instances of the second form in *Favenc* v. *Bennett* (*k*), *Morris* v. *Cleasby* (*l*), *Boyson* v. *Coles* (*m*), *Thornton* v. *Charles* (*n*), *Trueman* v. *Loder* (*o*).

In either case the person who receives and keeps such a note must be taken to know that the person signing it is acting as his broker, and to authorize him to do so: the broker, by the form of his note, says, "I have sold for you," and as a matter of evidence it is clear that silence in such case is assent to this assumption of authority; but there is some difference in the manner in which the notes must be used as a memorandum to satisfy the Statute of Frauds. When the name of both parties appears disclosed on the notes, each of them separately is a complete memorandum of the bargain, and the only question is, whether the broker signed it as an agent for the party sought to be charged. In *Hawes* v. *Forster* (*i*), in 1832, it was decided that proof that the broker delivered to the purchaser a bought note, containing the names of the seller and purchaser, and was employed by the seller, was sufficient to charge the seller, it being proved that there was a sold note, though its contents were not in evidence. Whether a bought note would be sufficient when there was no sold note at all is a disputed point.

But it seems to be different when the note does not disclose the name of both parties; there the note, as a memorandum, is defective from not showing who the contracting parties are, and it is doubtful whether the signature of the broker's name *sup- [*86] plies the deficiency, for he does not profess to sign as contracting party at all, but merely as an agent (*p*). The form of the note, and the custom of trade show that there is a corresponding note to which this refers, and if it be proved the two clearly form a complete memorandum; but if only one note exists, or what comes to the same thing, if one only is in evidence, it is very doubtful whether the statute is satisfied. This objection is entirely technical, and cannot be altered or obviated by any mercantile custom.

If the note be in form a complete memorandum, as it was in *Hawes* v. *Forster* (*q*), the doubt is, whether the authority of the

(*g*) *Powell* v. *Divett*, 15 East, 29.
(*h*) *Thornton* v. *Kempster*, 5 Taunt. 786.
(*i*) *Hawes* v. *Forster*, 1 M. & R. 368.
(*k*) *Favenc* v. *Bennett*, 11 East, 36.
(*l*) *Morris* v. *Cleasby*, 4 M. & S. 566.
(*m*) *Boyson* v. *Coles*, 6 M. & S. 14.
(*n*) *Thornton* v. *Charles*, 9 M. & W. 802.
(*o*) *Trueman* v. *Loder*, 11 A. & E. 589.
(*p*) The broker cannot sue in his own name on such a note, *Rayner* v. *Linthorne*, R. & M. 325. The same point seems to follow from the case of *Morris* v. *Cleasby*, 4 M. & S. 566.
(*q*) *Hawes* v. *Forster*, 1 Mo. & Rob. 368. The form there was "bought for Messrs. B. T. & W. Hawes, of Messrs. Forster & Smith, from 80 to 100 tons, &c.," signed by the broker.

broker to bind the parties by signing the bought note is not by custom conditional on his signing and delivering a sold note so as to put both parties on an equality. If the authority is absolute one note would bind the parties, though there was no other; if it is conditional it would not. In *Gregson* v. *Ruck* (*r*), the Queen's Bench seem to have inclined to think that the production of a sold note, and proof that the purchaser received the goods afterwards from the broker, was not sufficient to show that the broker signed the sold note as agent for the buyer without proof that he accepted a bought note, or in some other way showed that he was dealing with the broker as his broker, but the point seems not to have been decided.

The third form in which brokers sometimes make out their contract notes, is where the sale is made in the broker's name, so that on the face of the written contract he purports to be selling as principal. In the two previously mentioned forms, the broker, on the face of the note, says, "I am contracting for you with a principal;" in the first he gives the name of the principal, in the second [*87] he does not, but in each case he *professes on the face of the writing to be selling as an agent. But it is not uncommon for a broker to sell or buy as a broker, and yet to make out the notes in his own name. Instead of rendering to the buyer a bought note in the form "Bought for you by me," he renders him one in the form "Sold to you by me." By doing this, he pledges his own personal credit to the party, for having entered into a written contract in his own name, he cannot discharge himself by showing that he entered into it as agent only, however well that may have been known to all parties at the time (*s*).

But the case of a broker making a note in his own name, so as to render himself a party to the contract, is a very different one from that of a broker dealing as principal. When a principal authorises an agent to sell goods, as if the agent were principal, third persons are led to give the agent the same credit as if he were principal, and if any loss arises from their doing so, it is the principal's fault, and he must bear the loss. If, for instance, a person, who in respect of a transaction is, in truth, a debtor to the undisclosed principal but believes himself to be a debtor of the agent, and under that belief gives the agent credit, or does not press for the payment of his former credits, [that is to say, treats the outstanding debt due from the agent to him as set off against the debt from him to the agent incurred in this transaction] and the agent becomes insolvent, it is clearly just that the principal should make that person the same allowances and deductions which the principal led him to believe he would have from the agent with whom he supposed himself to be dealing as principal (*t*). And the same

(*r*) *Gregson* v. *Ruck*, 4 Q. B. 737.
(*s*) *Higgins* v. *Senior*, 8 M. & W. 444; 11 L. J. Ex. 199.
(*t*) See Smith's Law of Contracts, Lecture X.

principle applies where the debtor knows that the person with whom he contracts is not a principal, but the agent is authorized by his principal to represent that he has an interest in the contract. The principal must allow the same deductions which must have been made if the agent had the interest he was authorized to appear to have. The justice of this is pretty obvious, and *the [*88] law is in agreement with justice (*u*). But the contracting party has no right to compensation from the principal for losses arising from credit he may have given to the agent after he was aware that he had entered into the contract merely as agent; all that he has a right to claim is, to make those deductions which at the time of the disclosure of the true state of the case he would have had a right to make against the agent, had what the principal led him to believe been really true.

The difference, therefore, between a broker dealing in his own name but at the same time letting it be known that he is but a broker, and dealing as a principal, is marked. If he contracts as a principal, it is clear that the person with whom he contracts cannot be supposed to confer on him any authority to sign a memorandum of the bargain as agent for both parties, for he does not know that there is another party: so that, as far as regards the Statute of Frauds, a sale by or to a broker who deals as principal, in no respect differs from a sale to or by a principal himself. Whether the true principal whose existence was not disclosed be bound by such a sale or not, depends on different considerations. The question generally is, whether he has clothed the broker with a real or apparent authority to deal as principal, but that question is foreign to the present subject.

But a contract made by one known to be acting as broker for a principal, though entered into in the name of the broker, is different: the broker by the form of the written documents becomes a party to the contract, and the forms of action and pleading may be rendered different, but in substance, the effect is no more than if the contract had been made in the name of the principals, and the broker had guaranteed the due performance of the contract. The rights of the parties and of the broker are the same if all parties have notice of the truth, though the remedy may be changed.

A broker has no right capriciously to vary the remedies of his principal, and therefore he has no right to volunteer to *be- [*89] come a party to the contract. If, therefore, it is sought to fix the principal with a contract made in the name of the broker, there must be some proof that the broker had authority from the principal to contract in that manner. The practice is so common and so convenient, that it needs no strong evidence to show the principal's assent, but still I apprehend there must be some evidence (*x*).

(*u*) *Warner* v. *McKay*, 1 M. & W. 592; *George* v. *Clagget*, 7 T. R. 359.
(*x*) *Kemble* v. *Atkins*, 7 Taunt. 260; *Johnston* v. *Usborne*, 11 A. & E. 549.

The person who enters into a contract with a broker in the broker's name, but knowing that the broker is acting as a broker for a principal, may well give the broker authority to sign a memorandum of the contract for him; but the form of the note does not by itself show that he gives him such authority. If the purchaser takes a bought note in the form, "Bought for you by me," the mere acceptance of such a note furnishes evidence that he gave the person signing it a broker's powers. But if he takes a note in the form, "Sold to you by me," there must be some extraneous evidence to show that he authorized that person to bind him as a broker, for the note does not show this. All that can be said of it is, that it does not show the contrary.

The reported cases, upon the nature of the authority of the broker as an agent, authorized to sign a memorandum within the 17th section of the Statute of Frauds, are not so numerous as might be expected, insomuch that an attempt may be made to collect them all.

The first case on the point is that of *Rucker* v. *Cammeyer* (*y*), at Nisi Prius, before Lord Kenyon in 1794. It was an action by the vendor against the vendee of sugar. It was proved that the plaintiff's broker, after bringing the parties together, made out bought and sold notes, and that the defendant sent for and took away the bought note. An objection was taken that the Statute of Frauds was not satisfied, but Lord Kenyon said "that *Simon* v. *Motivos* (*z*) [*90] ruled the point." He said *"the broker must be considered as "the agent of both parties; but that he had in this case in fact given "the defendant a note in writing when he gave him the sale note, "which he had accepted." It is not in express terms said in the report whether there was a signed entry in the broker's book in evidence or not; but if there was, it seems that no weight was attached to it, at least by the reporter.

In *Hicks* v. *Hankin* (*a*), at Nisi Prius, before Heath, J. in 1802, the plaintiff, Hicks, employed Taylor (who in the report is described as a malt factor) to sell his malt at Storford Market. Taylor gave the plaintiff a note in the following terms:—"Sold Mr. George Hankin 320 quarters of Hick's Malt at 79*s*. J. Taylor," and he gave the defendant what in the report is called a duplicate of it. Heath, J. said this was sufficient to bind the contract, "as Taylor "was agent for both parties in making the contract, and his signing "was therefore valid."

The next case was *Chapman* v. *Partridge* (*b*), at Nisi Prius, before Mansfield, C. J. in 1805. It was an action for not delivering sumach. The defendant's partner (his brother's widow) entered into a treaty with the plaintiff for the sale to him of some sumach

(*y*) *Rucker* v. *Cammeyer*, 1 Esp. 105.

(*z*) The decision in *Simon* v. *Motivos*, W. Bl. 599, 3 Burr. 1921, *ante*, p. 2, in terms applied to sales by auction only.

(*a*) *Hicks* v. *Hankin*, 4 Esp. 114.

(*b*) *Chapman* v. *Partridge*, 5 Esp. 256.

belonging to the partners. She then told one Aylwin that he was to be the broker between them. Some days after, the plaintiff told Aylwin that he had made a contract with her. Aylwin sent her a sold note containing the terms of the contract as the plaintiff stated them. She did not return it, and some days after said she was sorry, as her brother-in-law was angry at what she had done: on this being proved, Mansfield, C. J. said, "The note in writing may "be received, it is signed by the broker, and the only question is, "if it was signed by the authority of the defendant's partner. It "is in evidence that she had consented that Aylwin should act as "broker, that authority might be countermandable, but when he "does act as agent to her in making the bargain, and she receives "the sale note, she *does not refuse it or send it back, but in [*91] "two days after expresses her sorrow for having done it. The jury "must say if Aylwin had any authority from the widow to make the "contract, or if what passed then was a recognition of his authority, "which would be the same thing as if she had given him his direc-"tions at first." The plaintiff recovered. In this case also it seems the broker's book was not relied on.

The next case is, in order of time, *Klinitz* v. *Surrey* (*c*), at Nisi Prius before Lord Ellenborough, in 1805, which is somewhat differently reported in *Espinasse* and in *Paley on Agency:* it was an action by the vendor of corn against the purchaser. It seems that the sale was made by the vendor's factor or broker entrusted with the possession of the goods, and that Lord Ellenborough decided that the factor was not prima facie an agent of the buyer, but that in the case there was sufficient evidence to show that the buyer adopted him as his agent; and also that an entry in his book not containing the names of the parties was a defective memorandum. After all the case went to the jury, and the defendant had a verdict on the merits. The case, therefore, decides nothing, but it is worthy of note as being the first reported case in which any attempt was made to use the broker's book as a memorandum between the parties.

In *Hinde* v. *Whitehouse* (*d*), in 1806, which was a case of a sale by auction, Lord Ellenborough, in delivering judgment, says, that "In all sales made by brokers acting between the parties, buying "and selling, the memorandum in the broker's book, and the bought "and sold notes transcribed therefrom, and delivered to the buyers "and sellers respectively, have been holden a sufficient compliance "with the statute to render the contract of sale binding on each."

The turn of the expression seems to show that Lord Ellenborough, at the time of delivering the judgment, A. D. 1806, *con- [*92] sidered the book as of some weight between the buyer and seller, and perhaps as of more weight than the notes.

This opinion seems to have gained strength in his mind, and in

(*c*) *Klinitz* v. *Surrey*, 5 Esp. 266, Paley, p. 171.
(*d*) *Hinde* v. *Whitehouse*, 7 East, 569.

1809, in *Heyman* v. *Neale* (*e*), at Nisi Prius, he is reported to have said, "After the broker has entered the contract in his book, I am "of opinion that neither party can recede from it. The bought and "sold note is not sent on approbation, nor does it constitute the "contract. The entry made and signed by the broker, who is the "agent of both parties, is alone the binding contract; what is called "the bought and sold note is only a copy of the other, which would "be valid and binding, although no bought or sold note was ever "sent to the vendor and purchaser." The plaintiff was, however, nonsuited on another ground, so that this ruling became immaterial. In 1816, Gibbs, C. J., apparently alluding to this case, said (Holt, 173) that the case had been contradicted; it does not, however, appear that Lord Ellenborough himself ever expressly abandoned his former opinion.

In 1810, in *Hodgson* v. *Davies* (*f*), at Nisi Prius, the sale was through a broker, who rendered bought and sold notes, by which Davies sold to Hodgson, payment to be by bill. Five days after the delivery of the notes, Davies returned the sold note, and, as far as then lay in his power, repudiated the contract. Lord Ellenborough at first thought that the contract must be absolute, unless the broker's authority was expressly limited, and the plaintiff had notice of it; but on an expression of opinion by the special jury, he assented to a custom which gave the vendor a right within a reasonable time to return the notes when the sale was on credit. This case is not a decision that the book is not the original contract, but it is one that might well shake Lord Ellenborough's confidence in his former opinion. It will be found that Lord Ellenborough does [*93] not in any subsequent case act on the *doctrine that the book is the original, though certainly he nowhere says it is not.

In 1812 two cases came before the full Court of King's Bench, which are perhaps more remarkable for what they did *not* decide than for what they did.

The first was *Powell* v. *Divett* (*g*). It was proved at the trial that the broker delivered to Powell and Co. a sold note in the following form:—"Messrs. Powell and Co. sold for your account, to Messrs. Divett and Co. the following parcels of Spanish wool (specifying them and the rates of price), customary tare and allowance to be paid for by acceptances, at six and eight months." This note was signed by the broker: he delivered at the same time a bought note to the defendant, which was not in evidence at the trial. After the sale Powell and Co. induced the broker to add a clause to the sold note, to the effect that such part of the wool as was damaged should be taken at a valuation. When Divett and Co. heard of this they objected. The declaration contained counts both on the original and on the altered notes. Lord Ellenborough, on these facts

(*e*) *Heyman* v. *Neale*, 2 Camp. 337.
(*f*) *Hodgson* v. *Davies*, 2 Camp. 531.
(*g*) *Powell* v. *Divett*, 15 East, 29.

being proved, was of opinion that the alteration of the written document annulled the contract, and he nonsuited the plaintiff. It was urged in banc that according to *Heyman* v. *Neale* (*h*) the note was not the contract, and consequently that an alteration in it could not annul the contract. The Court granted a rule nisi for a new trial, but on the argument it being brought to their notice that the entry in the broker's book was not signed, and that the bought note was not in evidence, the Court discharged the rule because whether the vitiation of the sold note destroyed the contract or not, it put an end to the only evidence produced at the trial to satisfy the statute. The Court abstained from saying what would have been the case if the bought note had been in evidence, and it is, perhaps, not too much to conjecture that they were not quite agreed upon that point. Had it been decided, the Court must have determined *whether the two notes formed the contract, or whether each [*94] separately was a memorandum of it, but not a part of the contract.

In *Humphries* v. *Carvalho* (*i*) the defendant's broker, on the Saturday gave the plaintiff a bought note of some ipecacuanha, "quality to be approved on Monday." He met the defendant, and told him what he had done, and therefore did not consider it necessary to send him a sold note. On the Friday following he sent the defendant a sold note, with the words "quality to be approved on Monday" struck out, to signify that the purchaser had approved it; the defendant immediately returned it, alleging as his reason that it had not been sent to him on Monday. The plaintiff had a verdict, and though a motion was made on another point, nothing was said in banc as to the Statute of Frauds. It does not appear from the report whether the bought note contained the names of both the buyer and seller, though it most probably did. The case seems an authority for this proposition, that one note only is sufficient to bind the contract when the party to be charged has expressly or tacitly dispensed with the delivery of the other note.

In 1814 the Court of Common Pleas came to an important decision. In *Thornton* v. *Kempster* (*k*) the broker had delivered the plaintiff a complete sold note for a sale of Petersburg hemp, signed by him; he delivered to the defendants a bought note, signed by him, corresponding in every particular with the sold note, except that it was for a purchase of Riga hemp. Riga and Petersburg hemp are different articles. The broker meant to have made both notes for the sale of Petersburg hemp, but he made a mistake in writing out the bought note. The Court of Common Pleas decided that there was no *contract*, because on the notes the parties were not agreed; Thornton was to sell one thing and Kempster to buy another, but to make a contract of sale the parties must agree

(*h*) *Heyman* v. *Neale*, 2 Camp. 337.
(*i*) *Humphries* v. *Carvalho*, 16 East, 45.
(*k*) *Thornton* v. *Kempster*, 5 Taunt. 786.

[*95] to buy and sell the same thing. In *Cumming* v. **Roebuck* (*l*), Gibbs, C. J. at Nisi Prius, in 1816, ruled the same point and remarked, "there is a case which states the entry in the broker's "book to be the original contract, but it has been contradicted." He probably alluded to Lord Ellenborough's ruling in *Heyman* v. *Neale* (*m*), *ante*, p. 92, which certainly seems quite at variance with the decision in *Thornton* v. *Kempster*. It does not appear whether the broker's book in *Thornton* v. *Kempster* (*n*) was in evidence or not; the expressions of Gibbs, C. J. in *Cumming* v. *Roebuck* (*l*), above quoted, seems to show that he at least thought it of no weight between the parties (*o*).

In 1815 (*p*) Lord Ellenborough, at Nisi Prius, reserved the point whether a sold note was sufficient to bind the vendor where there was neither a bought note nor an entry in the book, but the plaintiff was nonsuited on another ground, so that the point became immaterial.

In *Grant* v. *Fletcher* (*q*), in 1826, the broker made a jotting of part of the contract in his note book, gave the plaintiff a memorandum containing another part of the contract, and the defendant a memorandum of another part; each of the papers was imperfect, they did not refer to each other, and each was inconsistent with each of the other two. The plaintiff was, of course, nonsuited, but Abbott, C. J., in delivering judgment said, "The entry in the "broker's book is, properly speaking, the original, and ought to be "signed by him; the bought and sold notes delivered to the parties "ought to be copies of it. A valid contract may probably be made "by perfect notes, signed by the broker and delivered to the parties, "although the book be not signed."

[*96] *In *Goom* v. *Aflalo* (*r*), in 1826, this point was decided. In that case the bought and sold notes were perfectly regular and complete, and in the same terms as an entry in the broker's book, which was unsigned. The Court of King's Bench took time to consider, and then Abbott, C. J., delivered judgment that the contract was good. He said, "It is clear that the contract was made "in such a manner as to bind the defendant within the requisites "of the Statute of Frauds. If, therefore, it is to be held invalid, "this can only be done on the ground of some usage or custom of "merchants, which the Court is at liberty to recognize as part of

(*l*) *Cumming* v. *Roebuck*, Holt, 172.
(*m*) *Heyman* v. *Neale*, 2 Camp. 337.
(*n*) *Thornton* v. *Kempster*, 5 Taunt. 786.
(*o*) If there was a signed entry in evidence in *Thornton* v. *Kempster* (5 Taunt. 786), the decision seems to be that when the bought and sold notes differ there is no contract. It is now unquestioned law that when they differ they do not afford evidence of a contract, but it seems that Parke, B., does not admit the more extended proposition. (See *Thornton* v. *Charles*, 9 M. & W. 802.)
(*p*) *Dickenson* v. *Lilwal*, 4 Camp. 279, 1 Starkie, 128.
(*q*) *Grant* v. *Fletcher*, 5 B. & C. 436.
(*r*) *Goom* v. *Aflalo*, 6 B. & C. 117.

"the common law. No such usage has been found stated as a fact "upon the present occasion. There are several cases in the books "in which this point has been noticed; they were all cited at the "Bar, and it is unnecessary to repeat them. A signed entry in the "broker's book, and signed notes conformable to each other deliv-"ered to the parties, are spoken of as making a valid contract. "The entry in the book has been called the original, and the notes "copies, but there is not any actual decision that a valid contract "may not be made by notes duly signed, if the entry in the book "be unsigned; and in one case the late Lord Chief Justice Gibbs is "reported to have spoken of some supposed decision to that effect "as having been overruled. Under such circumstances we cannot "say that the rule for which the defendant contends has been "adopted by the Court as part of the law merchant. Strong "expressions as to the duty of the broker to sign his book do not go "far enough for this purpose, nor does the obligation to do this "which a broker is supposed to enter into upon receiving a license "to practise in the city of London. Brokers are, I believe, estab-"lished in the principal commercial towns on the Continent, under "municipal regulations, calculated to obtain punctuality and fidelity "in their dealings, and the signature of their book is certainly one "method of insuring these, and may in some cases furnish evidence "and facilitate the *proof of a contract. We have no doubt [*97] "that a broker ought to sign his book, and that every punctual "broker will do so. But if we were to hold such a signature essen-"tial to the contract we should go further than the Courts have "hitherto gone, and might possibly lay down a rule that would be "followed by serious inconvenience, because we should make the "validity of the contract to depend upon some private act of which "neither of the parties to the contract would be informed, and "thereby place it in the power of a negligent or fraudulent man to "render the engagements of parties valid or invalid at his pleasure."

A few months afterwards, in a case at Nisi Prius (*s*), Abbott, C. J. refused to receive the broker's book in evidence where there were bought and sold notes [which differed]. He said, "I used to "think at one time that the broker's book was the proper evidence of "the contract, but I afterwards changed my opinion, and held con-"formably to the opinion of the rest of the Court, that the copies "delivered to the parties were the evidence of the contract they "entered into, still feeling it to be a duty in the broker to take "care that the copies should correspond. I think I must still act "upon that opinion and refuse the evidence." The fact that the Chief Justice Lord Tenterden was induced to abandon his preconceived opinion adds much weight to the decision of *Goom* v. *Aflalo* (*t*), as it shows that the case was well considered. It also com-

(*s*) *Thornton* v. *Meux*, Moo. & Malk. 44.
(*t*) *Goom* v. *Aflalo*, 6 B. & C. 117.

pletely destroys the authority of his dicta in *Grant* v. *Fletcher* (*u*), as they were only expressions of an opinion which upon consideration he changed.

It may be convenient here to examine what the state of the authorities was, immediately before the decision of *Goom* v. *Aflalo* (*x*).

It seems to have been decided at Nisi Prius in *Rucker* v. *Cam-* [*98] *meyer* (*y*), *Hicks* v. *Hankin* (*z*), and *Chapman* v. **Partridge* (*a*), that the broker might bind the parties without making any entry in his book. It had never been so decided in Banco. The dictum of Lord Ellenborough in *Hinde* v. *Whitehouse* (*b*), and his ruling in *Heyman* v. *Neale* (*c*), afford an inference that his opinion was at one time the other way; but the subsequent cases of *Powell* v. *Divett* (*d*), *Humphries* v. *Carvalho* (*e*), and *Dickinson* v. *Lilwal* (*f*), show that he considered it by no means a point to be hastily decided. The case of *Thornton* v. *Kempster* (*g*), coupled with the expressions of Gibbs, C. J. in *Cumming* v. *Roebuck* (*h*), seem to show that Gibbs, C. J. was inclined to go the full length of excluding the broker's book altogether as evidence between buyer and seller. It is somewhat remarkable that there is no reported decision, not even at Nisi Prius, that the broker's book is admissible as evidence between the parties. Lord Ellenborough at one time evidently thought it was not only admissible but conclusive, but it never formed the ground of any reported decision of his. In *Klinitz* v. *Surrey* (*i*), the ruling was on the acceptance of a bulk sample; in *Heyman* v. *Neale* (*c*), the plaintiff was nonsuited on another ground. An opinion of Lord Ellenborough's, if it stood alone, would have very great weight, but against it is to be placed the opinion of Chief Justice Gibbs, and the more mature and deliberate opinion of Lord Tenterden. The decision of *Goom* v. *Aflalo* (*x*) has put an end to doubt on the point there decided, namely, that where there is no signed entry in the broker's book, the bought and sold notes make the contract: from some expres- [*99] sions of *Parke, B. it seems that learned judge doubted if the case was originally right, but he seems not to question that so far it is too well established to be overthrown. But the inference to be

(*u*) *Grant* v. *Fletcher*, 5 B. & C. 436.
(*x*) *Goom* v. *Aflalo*, 6 B. & C. 117.
(*y*) *Rucker* v. *Cammeyer*, 1 Esp. 105.
(*z*) *Hicks* v. *Hankin*, 4 Esp. 114.
(*a*) *Chapman* v. *Partridge*, 5 Esp. 256.
(*b*) *Hinde* v. *Whitehouse*, 7 East, 558.
(*c*) *Heyman* v. *Neale*, 2 Camp. 337.
(*d*) *Powell* v. *Divett*, 15 East, 29.
(*e*) *Humphries* v. *Carvalho*, 16 East, 45.
(*f*) *Dickenson* v. *Lilwal*, 4 Camp. 279.
(*g*) *Thornton* v. *Kempster*, 5 Taunt. 786.
(*h*) *Cumming* v. *Roebuck*, Holt, 172.
(*i*) *Klinitz* v. *Surrey*, 5 Esp. 266.

drawn from the reasoning of the Court in *Goom* v. *Aflalo* (*k*), and acted upon in *Thornton* v. *Meux* (*l*), viz., that the entry in the broker's book being a private act of which neither of the parties to the contract would be informed ought not to affect the parties, has been much questioned by him.

This point was much considered in the case of *Hawes* v. *Forster* (*m*), in the King's Bench. That was an action for not delivering oil. The first time it was tried in 1832, the plaintiffs produced and proved a bought note for the sale of oil to them "warranted to arrive on or before 30th June." The sold note was not in evidence, and the defendant's counsel, besides relying on that objection, offered to put in the broker's book to contradict the note, and show that the warranty was not part of the contract. This evidence was rejected by Lord Denman. The Court of King's Bench were much divided in opinion, but finally they granted a new trial, in order that mercantile evidence might be received, and the question, if necessary, carried to a court of error. At the new trial in 1834 [the sold note was in evidence and] it was proved in evidence and the jury found as a fact that according to the usage of trade, the bought and sold notes were the contract, and not the broker's book, which the evidence showed was in practice never referred to, and the plaintiffs recovered, although the defendants proved that the entry did not correspond with the note. The defendants did not attempt to question this verdict.

This point underwent some more discussion in *Thornton* v. *Charles* (*n*), in 1842. In that case there was a sold note, by which Thornton sold to the broker's unnamed principal 200 *casks of [*100] tallow, and a bought note, by which Charles bought of the broker's principal 50 casks; the fact was that the broker made three contracts of sale from Thornton to three different persons, and delivered only one sold note, but three bought notes. He entered the true contracts in his book and signed them; Lord Abinger nonsuited the plaintiff because the bought and sold notes did not correspond, and he thought the broker's book nothing. The Court of Exchequer all agreed in granting a new trial on another ground. On the main point, however, Parke, B. and Lord Abinger differed. Parke, B. said, "I apprehend it has never been decided that the "note entered by the broker in his book, and signed by him would "not be good evidence of the contract so as to satisfy the Statute of "Frauds, there being no other. The case of *Hawes* v. *Forster* (*m*) "underwent much discussion in the Court of King's Bench, when I "was a member of that Court, and there was some difference of "opinion among the Judges, but ultimately it went down to a new "trial to ascertain whether there was any usage or custom of trade

(*k*) *Goom* v. *Aflalo*, 6 B. & C. 117.
(*l*) *Thornton* v. *Meux*, Moo. & Malk. 44.
(*m*) *Hawes* v. *Forster*, 1 M. & R. 368.
(*n*) *Thornton* v. *Charles*, 9 M. & W. 802.

"which makes the broker's note evidence of the contract. In that "case there was a signed entry in the book which incorporated the "terms of making the contract void in the event of the non-arrival "of the goods within a certain time. The bought and sold notes "which were delivered to the parties omitted that clause. Cer-"tainly it was the impression of part of the Court that the con-"tract entered in the book was the original contract, and that "the bought and sold notes did not constitute the contract. The "jury found that the bought and sold notes were evidence of the "contract, but on the ground that those documents having been de-"livered to each of the parties after signing the entry in the book, "constituted evidence of a new contract made between them on the "footing of these notes. That case may be perfectly correct, but it "does not decide that if the bought and sold notes disagree, or "(*and?*) there be a memorandum in the book made according to the [*101] "intention of the *parties, that memorandum signed by the "broker would not be good evidence to satisfy the Statute of "Frauds." Lord Abinger was of a different opinion; he said, "I "have purposely avoided" (*i.e.* in his judgment delivered previously to that of Parke, B.) "giving any opinion about the question "of the bought and sold notes; but I desire it to be understood "that I adhere to the opinion given by me, that when the bought "and sold notes differ materially from each other, there is no con-"tract unless it be shown that the broker's book was known to the "parties."

The dicta of these two learned Judges are worthy of the more attention, because though the case did not call for a judgment upon the point, it seems that the contradictory opinions there expressed had been deliberately formed and long entertained. It may be remarked, however, that upon this occasion Mr. Baron Parke's account of the second trial of *Hawes* v. *Forster* (*p*) is at variance with the report usually received on very good authority.

If the report of *Hawes* v. *Forster* (*p*), in the Reports of *Moody* and *Robinson*, be correct, that case can scarcely have been decided by the finding of the jury that the broker's notes were evidence of a new contract substituted in lieu of a previous binding contract entered in the broker's book, for the evidence was that the broker could not tell which was first written, though it was all on the same day. It is not inconsistent with the terms of the report that the evidence may have shown that the notes were actually delivered to the parties a short time after the entry was signed; yet if the jury found a substitution of a contract on that ground, it was a somewhat subtle verdict, and the point, if left to them, would surely have been mentioned in the report. According to the report, the evidence was all on one side, and "several of the most emi-"nent merchants in the city all concurred in declaring that they

(*p*) *Hawes* v. *Forster*, 1 M. & R. 368.

"had never known any instance where the broker's book had been "referred to, and that they always looked to the bought and sold "notes as the contract." *And the question was left to the [*102] jury in these terms:—"Which according to the usage of the trade "in this city has been the binding contract, the broker's book, or "the bought and sold notes. If the evidence has satisfied you that "according to the usage of trade the bought and sold notes are the "contract (and the evidence adduced before you to show that they "are so considered, has not been met by any contradictory evidence "from the other side), then you will find your verdict for the plain-"tiffs."

"Verdict for the Plaintiffs."

This differs very materially from the statement reported to have been made by Mr. Baron Parke, in *Thornton* v. *Charles* (*q*), as it is submitted, that this is not a "finding by the jury that the bought "and sold notes were evidence of the contract on the ground that "these documents having been delivered to each of the parties after "the signing of the book, constituted evidence of a new contract "made between them on the footing of these notes;" but a direct finding of a mercantile jury under the direction of the Chief Justice, that the entry in the broker's book is not, according to usage, the contract.

If it could be shown that by the general law merchant a broker was bound to make an entry in his book, and that by the law merchant such an entry was the record of the contract between the parties, it might come to be a question whether the custom of England to disregard the book was to prevail against the general law merchant; but I have not found any indications of such being the general law merchant (*r*).

(*q*) *Thornton* v. *Charles*, 9 M. & W. 802.

(*r*) There has not come to my notice any passage in the old French or civil law to show that such a book was recognized in their law, but I have made too little search to be able to rest on this as affording a presumption that it was not a part of the law merchant. The Dutch and Italian law might probably afford more assistance, but I am ignorant of those languages. In Van der Linden's Law of Holland, by Henry, p. 565, it is said, that the brokers of Amsterdam are "bound to keep a proper register of all their transactions, to serve as proof in case of dispute." Lord Tenterden, however, in *Goom* v. *Aflalo* (6 B. & C. 117), seems to consider this a mere municipal regulation.

The Code Napoleon is very precise in its directions as to the books of brokers, but not more so than with regard to those of other traders, (as may be seen by the extract printed below); and there seems no fair inference to be drawn one way or the other from a system so radically different from our customs, both of trade and law. It is difficult to say, whether an English merchant who was compelled to submit his stock-book, journal, and the private book of his household expenses, once a year, to be examined by the Mayor and Recorder or a Master in Chancery; or an English lawyer, required to give credence to traders' books as proof of what was stated in them, would be most inclined to resent the order as unnatural.

[*103] *If there be any decision in the English reports that the broker's book is by the law merchant or by custom evidence between the parties, it has escaped my notice. There are, no doubt, many dicta to that effect entitled to much respect, but no actual decision. The inconvenience of the doctrine is well pointed out in *Goom* v. [*104] *Aflalo* (*s*): it makes the terms of *the contract "depend upon a private act of which neither of the parties would be informed."

The question, however, must remain very doubtful until there is a decision of a Court of Error on the point, for the judgment of one of the Courts below scarcely outweighs Mr. Baron Parke's strongly expressed opinion.

In *Townend* v. *Drakeford* (*t*), in 1843, at Nisi Prius the bought and sold notes differed, and there was an unassigned entry in the broker's book. Lord Denman, C. J., nonsuited the plaintiff, and it is clear, from his reference to *Hawes* v. *Forster* (*u*), that he was still of opinion that the bought and sold notes were the contract, al-

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Code de Commerce, Livre I., Titre deuxieme.—"Du Livres de Commerce."

8. Tout commerçant est tenu d'avoir un livre journal qui *présente* jour par jour ses dettes, actives et passives, les opérations de son commerce, ses négociations, acceptations, ou endossemens d'effets, et généralement tout ce qu'il reçoit et paie, a quelque titre que ce soit; et qui *enonce* mois par mois les sommes employées a la dépense de sa maison; let tout indépendamment des autres livres usités dans le commerce, mais qui ne sont pas indispensables.

Il est tenu de mettre en liasse les lettres missives qu'il reçoit, et de copier sur un registre celles qu'il envoie.

9. Il est tenu de fair, tous les ans, sous seing privé un inventaire de ses effets, mobiliers et immobiliers, et de ses dettes actives et passives, et de le copier année par année sur un registre special à ce destiné.

10. Le livre journal et les livres des inventaires seront paraphés, et visés une fois par année.

Le livre de copies des lettres ne sera pas soumis a cette formalité.

Tous seront tenus par ordre de dates sans blancs lacunes, ni transports en marge.

11. Les livres dont la tenue est ordonnée par les art. 8 et 9, ci dessus, seront cotés, paraphés, et visés, soit par un des juges des tribunaux de commerce, soit par le maire, ou un adjoint, dans le forme ordinaire et sans frais. Les commerçans seront tenus de conserver ces livres pendant dix ans.

12. Les livres des commerce regulierement tenus peuvent etre admis par le juge pour faire preuve entre commerçants pour faits de commerce.

13. Les livres que les individus faisants le commerce sont obligés de tenir, et pour lequéls ils n'auront pas observé les formalités ci dessus prescrites, ne pourront etre representes, ni faire foi en justice au profit des ceux qui les auront tenus sans prejudice de ce qui sera reglé au livre de Failletés et Banqueroutes.

* * * * 84. Les agens de change et courtiers sont tenus d'avoir une livre revetu des formes prescrites par l'art 11.

Ils sont tenus de consigner dans ce livre, jour par jour et par ordre de dates, sans ratures, interlignes, ni transpositions, et sans abbreviations ni chiffres, toutes les conditions des ventes achats assurances, negociations, et en general de toutes les operations faites par leur ministére.

(*s*) *Goom* v. *Aflalo*, 6 B. & C. 117.

(*t*) *Townend* v. *Drakeford*, 1 Car. & Kir. 20.

(*u*) *Hawes* v. *Forster*, 1 M. & R. 368.

though he considered that if nothing but a signed entry in the book was in evidence the Court must adopt it.

The difficulty of deciding these points may be gathered from the considered judgments of Lord Campbell, C. J., and Erle and Patteson, J. J., in *Sievewright* v. *Archibald* (*x*), in 1851. The simple facts of the case appear sufficiently from the judgment of Erle, J., which contains a most masterly statement of his views.

He said:—"In this case it appeared, by the evidence of the broker at the trial, that he agreed with the defendant to sell to him "500 tons of Dunlop's iron; that the Dunlop's iron was Scotch, "that he delivered to the defendant a bought note, in which the "thing bought was named Scotch iron, and to the plaintiff a sold "note, in which the thing sold was named Dunlop's iron: and it "further appeared that the defendant had repeatedly admitted the "existence of some contract by requesting the plaintiff to release "him therefrom upon terms.

"The plaintiff had declared for not accepting Dunlop's iron: but, "on the defendant producing the bought note, so that it was in evi-"dence, and, objecting that there was no contract because the "bought and sold notes varied, the plaintiff *then contended [*105] "that the defendant had ratified the contract expressed in the "bought note sent to the defendant. The declaration was then "amended to agree with the bought note; and the jury found their "verdict for the plaintiff, and that the defendant had ratified the "contract alleged in the amended declaration."

He continued, "I would observe that the question of the effect "either of an entry in a broker's book signed by him, or of the ac-"ceptance of bought and sold notes which agree, is not touched by "the present case. I assume that sufficient parol evidence of a con-"tract in the terms of the bought note delivered to the defendant "has been tendered, and that the point is, Whether such evidence is "inadmissible because a sold note was delivered to the plaintiff? in "other words, Whether bought and sold notes, without other evi-"dence of intention, are by presumption of law a contract in writ-"ing. I think they are not. If bought and sold notes which agree "are delivered, and accepted without objection, such acceptance "without objection is evidence for the jury of mutual assent to the "terms of the notes: but the assent is to be inferred by the jury "from their acceptance of the notes without objection, not from the "signature to the writing, which would be the proof if they con-"stituted the contract in writing." He then went on to point out that the form of the instruments is strong to show that they are not intended to constitute a contract, and said (*y*): "It is clear also "that, if, according to the opinion of witnesses, there is a right to "return the note if contrary to instructions, the keeping of the "note makes it binding, and not the signature. The governing

(*x*) *Sievewright* v. *Archibald*, 17 Q. B. 103; 20 L. J. Q. B. 529.
(*y*) Page 111.

"principle in respect of contracts is to give effect to the intention "of the parties; and, where the intention to contract is clear, it "seems contrary to that principal to defeat it because bought and "sold notes have been delivered which disagree. They are then "held to constitute the contract only for the purpose of annull-"ing it.

[*106] *"It seems to me therefore that, upon principle, the mere "delivery of bought and sold notes does not prove an intention to "contract in writing, and does not exclude other evidence of the "contract in case they disagree." After reviewing most of the reported cases, he proceeded, "From this review I gather that, in the "greater number of the cases, the doctrine, that bought and sold "notes are the sole evidence of the contract, is not recognised, nor was "the point decided that other evidence of the contract and of a com-"pliance with the statute is inadmissible, if bought and sold notes "have been delivered which disagree." Erle, J., was of the opinion that the other evidence in this case, viz., the evidence of ratification, was sufficient to show that the bought note expressed the contract between the parties. He was further of opinion that there was not any substantial variance between the notes.

That which Erle, J., actually decided was that the bought and sold notes were not the only evidence of the contract. It does not seem too much, notwithstanding the early passage in the judgment relating to the broker's book which has been set out, to assume that he would have held that the note in the broker's book was not the only evidence admissible. If that be the true effect of the judgment, the extent to which the broker is the agent in common of both parties can be little more than to make a binding contract, subject to the approval of his principals; a mere agent to register a proposed contract.

If a broker makes a contract which he was not authorised to make, and signs a memorandum and bought and sold notes of such a contract, the person who employed him may show that the broker was not his agent for the purpose of making that contract. If the broker acts within his authority, and makes a contract which he was authorised to make, and then proceeds to make a memorandum in his book, and signs bought and sold notes which agree, no question can arise. If, however, the book and the bought and sold notes differ, then if these document are to be looked upon merely as evidence but not [*107] the only evidence of what the contract was, *there seems to be no reason why evidence should not be given to show which of them truly sets out the contract.

If either party has accepted a note without making any objection to its terms, that would be strong evidence against him that that note truly set out the contract which he believed himself to have made, and if the other party at the trial relies on that note also it seems to be merely a question of evidence whether he has done so all along, or has shifted his ground for the purpose of the action.

If it can be shown that he at first treated his own note as the correct one, then the parties were never *ad idem*, and there is no evidence that there ever was a contract.

The view which was taken by Patteson, J., in *Sievewright* v. *Archibald* (*z*), was that the bought note was merely a statement or representation to the buyer of what he, the broker, had done for that person, and was not a memorandum signed for the purpose of binding him.

He then went on to say that he could not doubt that if a broker makes a signed entry in his book, "notwithstanding cases and dicta "apparently to the contrary, such memorandum would be the bind-"ing contract on both parties." But that in this case there was no signed entry, and therefore if there was a memorandum at all it must be either both the notes or one of them: That neither by itself can be so regarded, and that on this point all that was decided in *Hawes* v. *Forster* (*a*) was that if one only was produced, the other would be assumed to be the same until it was shown not to be. Therefore, if there was a memorandum at all, it must be both notes, and as, in his opinion, they differed, there was no evidence of any contract.

This judgment seems open to this remark, that although a note at the time when it was sent to the buyer or seller was a mere statement to him by the broker of what he had done, yet if both parties subsequently assent to the terms of that note, there does not seem to be any reason why it should not be regarded as a memorandum of the contract.

*Lord Campbell's view (*b*) was that there was no evidence [*108] of ratification of the bought note by the defendant. That the entry in the broker's book, if there is one, is the binding contract between the parties, and that a mistake in the bought or sold note would not affect its validity. That a long series of cases had established that where there was no entry in the broker's book, the bought and sold notes were the evidence of the contract, provided there was no substantial difference; but if there was that difference there was no evidence of any contract. And that in this case there was a substantial difference.

This judgment is in most respects of the same effect as that of Patteson, J., but it is very difficult to say to what extent it differs from that of Erle, J. The aim of the judgment of Erle, J., was to point out that evidence of ratification of one note was admissible. Lord Campbell begins his judgment by stating that there was no evidence of ratification.

It was formerly a matter of doubt whether an action could be brought on one note only.]

(*z*) *Sievewright* v. *Archibald*, 17 Q. B. 103; 20 L. J. Q. B. 529.
(*a*) *Hawes* v. *Forster*, 1 M. & R. 368.
(*b*) Which Whiteman, J., had read and concurred in.

In *Henderson* v. *Barnewall* (*c*), in 1827, the Court of Exchequer evaded the question by what seems an odd decision on a question of fact. Rowland Roscoe was a broker in Liverpool; his brother William was his salesman and clerk. The clerk, William, did the actual broker's work in this sale, but the sold note on which the plaintiff relied was signed by the master, Rowland, and the Exchequer decided that the clerk was the broker, and his master a mere stranger. The general understanding of men is, that an order given to a trader's clerk is given to the master, and that work done by the clerk is done for the master. It is evident from the facts that both Rowland and William viewed the transaction in that light, but the Exchequer did not.

[In the case of *Crofts* v. *Parton* (*d*), in 1864, the defendant called on the brokers and asked them to purchase iron for him, [*109] leaving it to them to settle the price. At this time the *brokers had already had instructions from the plaintiff to sell iron for him. The brokers sold the plaintiff's iron to the defendant, and sent notes to both parties.

The note sent to the defendant was the sold note, in these terms:—"Sold to S. Parton, Esq., on account of principals," &c., signed by the brokers.

This note, on being produced by the defendant, was put in evidence by the plaintiff, who did not produce the bought note, nor was it called for. No entry in the broker's book was put in. It was contended for the defence that the sold note only was in evidence, whereas both notes should have been put in. But the Court, consisting of Erle, C. J., Williams, Keating, and Willes, J., held that this was a sufficient memorandum.]

The point is, however, much connected with another, on which there is some authority, namely, whether a principal has in general a right to refuse to receive, or be bound by a contract delivered to him by a broker whom he has employed in the ordinary manner. If the principal has a right on receipt of the note to return it and repudiate the contract altogether, it is manifest that there is no absolute contract until he has either adopted the contract by retaining a note delivered to him, or waived his right to have an opportunity to return the note, and so repudiate the contract. The objection in such cases is not that there is no sufficient memorandum of the contract to satisfy the Statute of Frauds, but there is no contract at all, for the authority of the broker in such cases is merely to negotiate a bargain and propose it to his principal, who is to be bound by it unless he dissents. Till, therefore, the proposal is expressly or tacitly accepted, the contract is not made.

Proof has in some cases been given of a usage in London, by which the principals have a right to return the broker's note within twenty-four hours, and so to refuse to be bound by the contract.

(*c*) *Henderson* v. *Barnewall*, 1 Y. & J. 387.
(*d*) *Crofts* v. *Parton*, 16 C. B. N. S. 11; 33 L. J. C. P. 189.

In *Heyman* v. *Neale* (*e*), in 1809, the defendant seems to *have relied on this usage as a part of the law merchant, [*110] not requiring proof. In that case the broker seems to have had express authority to make the contract, and Lord Ellenborough is reported to have used terms that may have borne reference to the peculiar circumstance of the broker's express authority, but which certainly seem to have been expressed generally to the effect that no such custom was part of the law.

In *Hodgson* v. *Davies* (*f*), in 1810, there had been bought and sold notes delivered for the sale of tobacco, payment to be by bill. Five days afterwards the defendant, who was the vendor, refused to proceed with the contract. The defence was, that the person who sells goods by a broker reserves to himself the power of ratifying or rejecting the contract, as he shall be satisfied with the credit of the purchaser. The special jury said, that unless the name of the purchaser had been previously communicated to the seller, if the payment is to be by bill, the seller is always understood to reserve to himself the power of disapproving of the sufficiency of the purchaser and annulling the contract, but that he must exercise that power more promptly than the defendant in this case had done.

This finding of the jury, it is to be observed, is limited in terms to the case of a vendor upon credit, and seems to give him a reasonable but uncertain time to exercise his option.

In *Humphries* v. *Carvalho* (*g*), in 1812, it is said that evidence was given that it was the custom of trade for either party to return the contract note if he disapproved of it within twenty-four hours. This custom, if it existed, would have had some bearing upon the merits of that cause, but as it was irrelevant to the point on which the case is reported, the accuracy of the reporter's statement cannot be depended upon.

In *Hawes* v. *Forster* (*h*), at the second trial, in 1834, *evi- [*111] dence was given by some eminent merchants "that if the broker's "bought or sold note, as the case might be, were not consonant "with their directions to the broker they returned it." This seems to be nearly the same thing as the statement in *Humphries* v. *Carvalho* (*g*), and is open to the same remark. It had a bearing on the question then at issue, and is therefore of some weight; but as it was rather collateral to it, there is not any reason to look upon either the evidence or the report as minutely accurate.

[In *Thompson* v. *Gardiner* (*k*), in 1876, a broker was employed by the plaintiff to sell for him. He delivered notes to both buyer and seller, but he signed the one given to the seller only. The defendant kept his note for two or three weeks and then repudiated

(*e*) *Heyman* v. *Neale*, 2 Camp. 337, *ante*, p. 92.
(*f*) *Hodgson* v. *Davies*, 2 Camp. 531.
(*g*) *Humphries* v. *Carvalho*, 16 East, 45.
(*h*) *Hawes* v. *Forster*, 1 M. & R. 368.
(*k*) *Thompson* v. *Gardiner*, 1 C. P. D. 777.

the contract. Brett, J., delivering the judgment of the Court upholding the verdict for the plaintiff, said, "The authorities are conclusive to show that the broker acting for one of the contracting parties, making a contract for the other, is not authorized by both to bind both. But the broker who makes a contract for one may be authorized by that person to make and sign a memorandum of the contract. That has frequently been held. The question here is whether there was any evidence that the broker was so authorized." And Brett, J., was of opinion that there was ample evidence that the defendant had recognized the broker's authority to sign for him (*l*).]

In all cases to which such a custom applies it is evident that the broker has no *primâ facie* authority to *make* a contract, and when there is but one contract note delivered there must be something proved beyond the mere existence of the relation of broker and principal between the broker and the party who has not received and retained the note, or else there is no proof of a contract on his part. And when there is independent proof that the principal did in fact enter into a parol contract to the same effect as that con- [*112] *tained in the note, it would seem to require extraneous proof to show that he authorized the broker to sign a contract for him without delivering a note to himself. And at all events he could not be taken to give the broker *primâ facie* authority to sign anything but a memorandum of the contract actually made, and consequently it would be open to him to show that the note was not a memorandum of the true contract. In the case of *Pitts* v. *Beckett* (*m*), in the sittings after Trinity Term, 1845, the Exchequer is said to have decided on these principles, but giving them rather a more extensive application. That was an action for not accepting goods. The parties had been brought together by a Liverpool broker and had made a bargain personally. The broker afterwards rendered the plaintiff a sold note signed by the broker, describing the sale as unqualified. He did not render any bought note. The defence was, that the real contract was one with a warranty which was not complied with, and the jury found that such was the fact. The case took a double shape. Was there evidence to satisfy the Statute of Frauds, there being only one note, and was that note a written contract, so as to preclude the parties from giving evidence of terms not contained in it? Cresswell, J., at Nisi Prius, at Liverpool, directed the jury to find for the defendant, but reserved both points, and the plantiff obtained a rule nisi to enter a verdict for him, which was afterwards discharged. I was not present at the argument in Banc, but I am informed that the Court said that a broker had in no case *primâ facie* authority to do more than to negotiate the contract and write down the terms of the contract

(*l*) See also *Moore* v. *Campbell*, 10 Ex. 323; 26 L. J. Ex. 310.
(*m*) *Pitts* v. *Beckett*, 13 M. & W. 743; 14 L. J. Ex. 358.

actually made; and that, consequently, at all events this note signed by him was not within his authority (*n*).

It had previously been decided at Nisi Prius, once by Lord Kenyon (*o*), in 1794, and once by Parke, J. (*p*), in *1830, [*113] that a broker employed to purchase at an auction, had no apparent authority from his principal to do anything more than purchase the particular article mentioned by his principal on the terms brought to the principal's notice. The decision in *Pitts* v. *Beckett* (*q*) seems to extend the principle of these cases. But it cannot extend to cases where the broker is entrusted with any token of authority to make a contract: as for instance, when he is entrusted with the custody of the goods or delivery orders: or perhaps, where he is permitted to have the samples, though that must depend on the light in which merchants view the possession of the samples.

[In the case of *Heyworth* v. *Knight* (*r*), in 1864, which was an action for not accepting a cargo, the defendant had by letter authorised his brokers to buy for him on certain terms: his brokers then wrote to the plaintiff's brokers making an offer in terms which differed from their authority, but which the Court considered to be in substance the same. This offer was accepted. The bought and sold notes which were then drawn up did unquestionably differ from the accepted offer. The declaration was founded on the terms of the authority and not on the notes. The Court upheld the verdict for the plaintiff, being of opinion that it was competent to him to bring an action on the contract disclosed by the letters. Erle, C.J., said, "Some-"thing was said by Mr. Mellish about the letters not constituting a "binding contract between the parties, because a more regular and "extended contract was contemplated (*s*). That notion, however, is "totally at variance with the law as laid down by many cases in "the Court of Queen's Bench, where the broker's book has been "allowed to be resorted to for evidence of the contract, though the "parties INTENDED to contract by means of bought and sold notes, "where there has been a variance between these documents" (*t*). Perhaps it may be suggested that *in the above important [*114] passage the expression "intended to contract" may be read as "intended to evidence the contract."

It would seem from these very conflicting authorities that it is still a matter in doubt whether any document can be said to be *the* memorandum of the contract. Mr. Benjamin deduces (*u*) certain

(*n*) See also *Sievewright* v. *Archibald*, 17 Q. B. 103; 20 L. J. Q. B. 529; *Heyworth* v. *Knight*, 17 C. B. N. S. 298; 33 L. J. C. P. 298.

(*o*) *The East India Co.* v. *Hensley*, 1 Esp. 112.

(*p*) *Horsfall* v. *Fauntleroy*, 10 B. & C. 755.

(*q*) *Pitts* v. *Beckett*, 13 M. & W. 743; 14 L. J. Ex. 358.

(*r*) *Heyworth* v. *Knight*, 17 C. B. N. S. 298; 33 L. J. C. P. 298.

(*s*) See *Lewis* v. *Brass*, 3 Q. B. D. 667.

(*t*) Willes, J., in this case dissented from the opinion of the majority of the Judges in *Cowie* v. *Remfry*, 5 Moo. P. C. C. 232.

(*u*) 2nd ed., Benjamin on Sales, 221.

propositions from them, the first one being that the signed entry in the book *constitutes* the contract, the second one is that the notes do *not constitute* the contract, the third and fourth ones being that both or either note may satisfy the statute. What precise meaning the word *constitute* here has, it is difficult to see. A writing cannot, strictly speaking, constitute a promise, although it may be the best evidence of it.

Erle, J., in his very learned and powerful judgment delivered in *Sievewright* v. *Archibald* (*x*), drew attention "to the distinction be-"tween the evidence of a contract, and evidence of a compliance "with the Statute of Frauds. The question of compliance with "the statute does not arise until the contract is in proof. In case of "a written contract the statute has no application. In case of other "contracts (*i. e.* unwritten ones), the compliance may be proved by "part payment, or part delivery, or memorandum in writing of the "bargain. Where a memorandum in writing is to be proved *as a* "*compliance* with the statute, it differs from a contract in writing, "in that it may be made at any time after the contract, if before "the action commenced; *and any number of memoranda may be* "*made, all being equally originals.*"

This very significant passage if it does not suggest seems, to say the least of it, to be consistent with the view that where there are several memoranda in existence differing from each other and all purporting to be memoranda of the contract, it is *a matter of evidence* which of them, if any, is a memorandum of the contract which the parties intended to enter into.]

[*115] **Parol variations of Written Contracts.*

[When a contract, which must be in writing under the Statute of Frauds, has been entered into in writing, it occasionally happens that the parties verbally agree to some alteration in it, or in the mode of carrying it out.

If any disagreement should arise in carrying out the altered contract, neither party can bring an action on the verbally altered contract, where the alteration should have been evidenced by writing to be valid. As Lindley, J., said in *Hickman* v. *Haynes* (*y*), in 1875, "Neither a plaintiff nor a defendant can at law avail himself "of a parol agreement to vary or enlarge the time for performing "a contract previously entered into in writing, and required so to "be by the Statute of Frauds."

It becomes a question then whether either party can bring his action on the original contract.

Where the original contract has been rescinded neither party can avail himself of it, and in these cases of parol variations the defend-

(*x*) *Sievewright* v. *Archibald*, 17 Q. B. 107; 20 L. J. Q. B. 529.
(*y*) *Hickman* v. *Haynes*, L. R. 10 C. P. 598; 44 L. J. C. P. 358.

ant's argument has frequently been that the original contract must be taken to have been rescinded by the parties when they entered or thought they were entering into a substituted contract.

Where another contract can be proved to have been substituted for the original, as where both were in writing, it is probably a matter of law that the parties intended to rescind the original, but where no substituted agreement by which the parties bound themselves can be proved, it is a question of fact whether the parties did intend to rescind it when they entered into, or rather intended to bind themselves by, a substituted contract.

There does not seem to be any doubt that a contract which must be in writing may be rescinded verbally (*z*). If the original contract has not been rescinded either party may *bring his [*116] action on it provided he can show his readiness and willingness to perform it.

In several of the following cases there has been a request by one party to postpone delivery, and it has been urged in argument that the agreement to postpone amounted to a substituted contract the same as the original in all respects except as to the time of delivery; but this is not necessarily nor usually the case. Such an agreement generally amounts to nothing more than a license by one party to the other to depart in that particular respect from the terms of the agreement, and is not a contract at all.

In *Cuff* v. *Penn* (*a*), in 1813, the defendant agreed to buy bacon of the plaintiffs, to be delivered in certain quantities on certain days. After some of the deliveries had been made the defendant represented to the plaintiffs that the sale of bacon was dull and requested them not to press it on him, and they assured him they would not, and consequently they postponed the deliveries. Eventually the defendant refused to accept any. And when the plaintiffs brought their action for not accepting it was argued for the defendant that the plaintiffs were suing on a contract which was a parol variation of a written contract, or was a parol contract substituted for a written one, in which case it would be void under the statute, for there had been neither a part acceptance nor a part payment. But Lord Ellenborough, C. J., overruled both objections, and the Court upheld the verdict for the plaintiffs.

In *Stead* v. *Dawber* (*b*), in 1839, the plaintiff agreed in writing to buy of the defendants a sloop-load of bones to be delivered on the 20th to the 22nd. Some days afterwards the plaintiff's broker pointed out that the 22nd was a Sunday, and asked the defendants if they would deliver all the bones on the 21st. The defendants said 'You had better say the 23rd or 24th.' The price of bones having risen they were not sent. Lord Denman, C. J., delivering the judgment of the Court said that the question was mainly

(*z*) *Goss* v. *Lord Nugent*, 5 B. & Ad. 65.
(*a*) *Cuff* v. *Penn*, 1 M. & S. 21.
(*b*) *Stead* v. *Dawber*, 10 A. & E. 57.

[*117] one of fact, viz., *did the parties intend to substitute a new contract for the old one, the same in all respects except those of the day of delivery and payment. The Court being of opinion that they did, ordered a verdict to be entered for the defendants.

This case was considered to have overruled *Cuff* v. *Penn* (*c*), but is itself very doubtful law.

In *Marshall* v. *Lynn* (*d*), in 1840, the defendant contracted in writing to buy of the plaintiff a quantity of potatoes to be shipped on board the plaintiff's brig, *The Kitty*, on her arrival at Wisbech the next time. On her arrival there, the defendant's son requested that she might first go to Lynn and from there take a cargo to London and then return to Wisbech. The plaintiff sent her accordingly. When she had returned to Wisbech and the plaintiff offered to load her, the defendant refused to take the potatoes. The plaintiff was nonsuited on the ground that this was a parol variation of a written contract and was not binding.

It appears to have been considered in some of the preceding cases that the parol variation to raise a presumption of rescission must have been an essential part of the contract. Parke, B., said that this was unnecessary, for that "every part of the contract in "regard to which the parties are stipulating, must be taken to be "material."

Baron Parke, approved of *Stead* v. *Dawber* (*e*), but it seems pretty clear that *Stead* v. *Dawber* (*c*) was wrongly decided, and is distinguishable from *Marshall* v. *Lynn* (*b*).

Goss v. *Lord Nugent* (*f*), in 1840, established in the case of a contract relating to an interest in land that if the original contract be varied and a new contract as to any of its terms substituted in the place of it, the new contract cannot be enforced unless it be also in writing.

In *Moore* v. *Campbell* (*g*), in 1854, the contract note on which the [*118] action was brought for not delivering, stated that *the delivery of the hemp was to be from the quay. When the defendant informed Wilks, the plaintiff's agent, that the hemp had been put on the quay, Wilks requested that it might be warehoused on the plaintiff's account, which was done. Wilks then told the defendant to draw on the plaintiff for the hemp as soon as he was in a position to transfer it. Owing to a difference about the quantities, Wilks refused to give the defendant the plaintiff's acceptances. It was argued for the defendant, who had resold the hemp, that a verbal contract to deliver from the warehouse had been substituted for the written contract to deliver from the quay, and that the written contract was therefore rescinded. Parke, B., said, "We do

(*c*) *Cuff* v. *Penn*, 1 M. & S. 21.
(*d*) *Marshall* v. *Lynn*, 6 M. & W. 109; 9 L. J. Ex. 117.
(*e*) *Stead* v. *Dawber*, 10 A. & E. 57.
(*f*) *Goss* v. *Lord Nugent*, 5 B. & Ad. 65.
(*g*) *Moore* v. *Campbell*, 10 Ex. 323; 26 L. J. Ex. 310.

"not think that this plea was proved by this evidence. If a new "*valid* agreement substituted for the old one before breach would "have supported the plea, we need not enquire, for the agreement "was void."

In *Noble* v. *Ward* (*h*), in 1866, the defendants on the 12th of August contracted to purchase goods from the plaintiff to be delivered within stated times. On the 18th they entered into another contract in writing for the purchase of goods to be delivered and paid for within stated times. On the 27th the parties verbally agreed that the contract of the 12th should be cancelled and the time for delivery and payment under the contract of the 18th should be extended. The defendants eventually refused to take the goods. And it was argued for them that the contract of the 18th was rescinded by the substitution of that of the 27th, which was admitted to be invalid. At the trial the plaintiff was nonsuited on this ground. On the motion for a new trial, which was granted, Bramwell, B., delivering a judgment which was concurred in by the other judges, was of opinion that the contract of the 18th was not in fact rescinded. The Exchequer Chamber affirmed this judgment—Willes, J., saying that at least it was a question for the jury whether the parties did intend to rescind it. It had been argued *for the defendants that a parol contract varying [*119] the terms of a written one, which would have operated as a rescission of the written one had it been in writing and therefore valid would so operate although invalid, not being in writing. But the Courts were of the contrary opinion.

There is nothing in the 17th section to show that a written contract within that section may not be rescinded by express verbal agreement. And where the Court can take notice of the fact that a valid contract has been substituted that may raise a presumption in law that the parties intended the earlier contract to be rescinded, but where no valid agreement to substitute a contract can be proved, the ground for such a presumption is gone.

In *Ogle* v. *Earl Vane* (*i*), in 1867, it was contended that the plaintiff was in fact suing for the breach of a verbal agreement to deliver at a date later than that fixed by the original agreement. The defendant had contracted to deliver iron to the plaintiff not later than July. In consequence of an accident to his furnaces the defendant was unable to deliver by that time, and a correspondence took place in which the plaintiff pressed for delivery. Eventually the plaintiff bought in against the defendant at an advanced price in the following February. Blackburn, J., said that the effect of the negotiations was, not that the plaintiff had substituted any new contract for the old one, but in order to suit the defendant's con-

(*h*) *Noble* v. *Ward*, L. R. 1 Ex. 117; L. R. 2 Ex. 135; 35 L. J. Ex. 81; 36 L. J. Ex. 91.

(*i*) *Ogle* v. *Earl Vane*, L. R. 2 Q. B. 275; L. R. 3 Q. B. 272; 36 L. J. Q. B. 175; 37 L. J. Q. B. 77.

venience had said, "'I'll wait, but I do not bind myself to wait.' "This distinction between waiting and not binding one's self to "wait, is the same as that between a mere license and a contract; "or as that between giving time to principal by mere forbearance, "and binding one's self for a good consideration to give time, in "which latter case only is the surety released. The question in "such cases being, 'Have you ever bound yourself?'" And the [*120] Court held that the plaintiff was *entitled to recover; and was affirmed in the Exchequer Chamber (*k*).

In *The Leather Cloth Co.* v. *Hieronimus* (*l*), in 1875, the defendant verbally contracted to buy goods from the plaintiffs, to be sent from London *viâ* Ostend by Messrs. Gaudet Frères. When the goods were ready for delivery Gaudet Frères had ceased to carry *viâ* Ostend, and the plaintiffs sent the goods *viâ* Rotterdam and an invoice to the defendant. The goods were lost at sea. In answer to a request for payment, the defendant wrote in such a manner that the Court held there was a sufficient memorandum of the contract to send *viâ* Ostend, and there was ample evidence that the defendant had ratified or assented to the change of route. It appears to have been argued for the defendant that there was a substituted contract, viz., to send *viâ* Rotterdam, and that there should have been evidence of it in writing to enable the plaintiffs to succeed. Cockburn, C. J., Blackburn, Mellor, and Archibald, JJ., held not. Blackburn, J., said, "I cannot see why the assent "to a substituted mode of performing one of the terms of a con-"tract need be in writing and may not be by parol, though the "original contract must have been in writing. They are quite dif-"ferent things; the proof of a substituted contract, and the proof "of a ratification or approval, after performance, of the substituted "mode of performance."

In *Hickman* v. *Haynes* (*m*), in 1875, the plaintiff in writing contracted to deliver to the defendants 100 tons of iron in equal instalments in March, April, May, and June. The three first instalments were delivered and paid for. In June the defendant verbally requested that the June delivery might be postponed, and in August a correspondence relating to a further postponement took place. The defendants eventually refused to take the iron. It was [*121] argued for them that the verbal *agreement to postpone the June delivery was a good excuse in law for not accepting *in* June according to the original contract, and further, that as it was not in writing, it was not a good contract to accept *after* June. The Court, however, was of opinion that this was not the substitution of one agreement for another, but merely a forbearance to deliver at the defendant's request.

(*k*) See also *Tyers* v. *Rosedale and Ferryhill Iron Co.*, in 1873, L. R. 8 Ex. 305; L. R. 10 Ex. 195; 42 L. J. Ex. 185; 44 L. J. Ex. 130.

(*l*) *The Leather Cloth Co.* v. *Hieronimus*, L. R. 10 Q. B. 140; 44 L. J. Q. B. 54.

(*m*) *Hickman* v. *Haynes*, L. R. 10 C. P. 598; 44 L. J. C. P. 358.

In *Plevins* v. *Downing* (*n*), in 1876, the defendant in June bought of the plaintiffs 100 tons of iron, "delivery, 25 tons at once, and 75 tons in July next." By the end of July 75 tons had been delivered; there was no evidence of a request by the defendants to have delivery of the remaining 25 tons postponed till after July: In October the defendants verbally requested that they should be sent, but subsequently declined to accept them. The Court upheld the verdict for the defendant, on the grounds set forth by Brett, J., who delivered the judgment of the Court. He said:—

"It seems to us, however, that the verdict was rightly directed to "be entered for the defendant. It is true that a distinction has "been pointed out and recognised between an alteration of the "original contract in such cases and an arrangement as to the mode "of performing it. If the parties have attempted to do the first "by words only, the Court cannot give effect, in favour of either, "to such attempt: if the parties make an arrangement as to the "second, though such arrangement be only made by words, it can "be enforced. The question is, what is the test in such an action "as the present, whether the case is within the one rule or the other.

"Where the vendor, being ready to deliver within the agreed "time, is shown to have withheld his offer to deliver till after the "agreed time in consequence of a request to him to do so made by "the vendee before the expiration of the agreed time, and where "after the expiration of the agreed time and within a reasonable "time the vendor proposes to deliver, and the vendee refuses to "accept, the *vendor can recover damages. He can prop- [*122] "erly aver and prove that he was ready and willing to deliver ac- "cording to the terms of the original contract. He shows that he "was so, but that he did not offer to deliver within the agreed "time, because he was within such time requested by the vendee "not to do so. In such case it is said that the original contract is "unaltered, and that the arrangement has reference only to the "mode of performing it. But if the alteration of the period of "delivery were made at the request of the vendor, though such re- "quest were made during the agreed period for delivery, so that "the vendor would be obliged, if he sued for a non-acceptance of "an offer to deliver made after the agreed period, to rely upon "the assent of the vendee to his request, he could not aver and "prove that he was ready and willing to deliver according to the "terms of the original contract. The statement shows that he was "not. He would be driven to rely on the assent of the vendee to "a substituted time of delivery, that is to say, to an altered time or "a new contract. This he cannot do so as to enforce his claim. "This seems to be the result of the cases which are summed up in "*Hickman* v. *Haynes* (*o*)."

(*n*) *Plevins* v. *Downing*, 1 C. P. D. 220; 45 L. J. C. P. 695.
(*o*) Law Rep. 10 C. P. 598.

*PART II. [*123]

WHAT AGREEMENTS AMOUNT TO A BARGAIN AND SALE, AND WHAT ARE BUT EXECUTORY.

CHAPTER I.

GENERAL RULES TO ASCERTAIN WHETHER AN AGREEMENT AMOUNTS TO A BARGAIN AND SALE OR NOT.

THE next question to be considered is, what are the circumstances under which a contract (good within the statutes) amounts to a bargain and sale of goods, so as to operate as an actual sale of them, and when not ?

This is, properly speaking, a question depending upon the construction of the agreement, for the law professes to carry into effect the intention of the parties as appearing from the agreement, and to transfer the property when such is the intention of the agreement, and not before. In this, as in other cases, the parties are apt to express their intention obscurely, very often because the circumstances rendering the point of importance were not present to their minds, so that they really had no intention to express. The consequence is, that without absolutely losing sight of the fundamental point to be ascertained, the Courts have adopted certain rules of construction which in their nature are more or less technical; some of them seem very well fitted to aid the Court in discovering the intention of the parties: the substantial sense of others may be questioned (*a*).

The parties do not contemplate a bargain and sale till the specific goods on which that contract is to attach are agreed *upon. [*124] But when the goods are ascertained, the parties are taken to contemplate an immediate bargain and sale (*b*) of the goods unless there be something to indicate an intention to postpone the transference of the property till the fulfillment of any conditions ; and when by the agreement the seller is to do anything to the goods for the purpose of putting them into a deliverable state, or when any-

(*a*) *Post*, p. 175.

(*b*) [A "bargain and sale" was an expression of very definite meaning in use in the old forms of pleading: it stands for what is sometimes called an "executed contract," that is one where the property has passed. An executory contract is one where the property has not passed. Neither "executed" nor "executory" refer to something done or to be done according to the contract other than as above.]

thing is to be done to them to ascertain the price, it is presumed that the parties mean to make the performance of those things a condition precedent to the transference of the property. But as these are only rules for construing the agreement, they must yield to anything in the agreement that clearly shews a contrary intention, for the parties may lawfully agree to an immediate transference of the property in goods, although the seller is to do many things to them before they are to be deliverable; and, on the other hand, they may agree to postpone the vesting of the property till after the fulfillment of any conditions they please.

These rules require a careful examination of the cases in which they have been applied, in order to perceive their precise meaning and force (*c*).

The goods must be specified.

The first of these rules, that the parties must be agreed as to the specific goods on which the contract is to attach before there can be [*125] a bargain and sale, is one that is founded *on the very nature of things. Till the parties are agreed on the specific individual goods (*d*), the contract can be no more than a contract to supply goods answering a particular description, and since the vendor would fulfil his part of the contract by furnishing any parcel of goods answering that description, and the purchaser could not object to them if they did answer the description, it is clear there can be no intention to transfer the property in any particular lot of goods more than another, till it is ascertained which are the very goods sold.

This rule has existed at all times; it is to be found in the earliest English law books. In the Year Book (*e*) the Justices all agreed that a grant to kill and take a deer in the grantor's park conferred no property in any deer; but Brian (then Chief Justice) said, "But if I have a black deer amongst others in my park, I can "grant him, and the grant is good; and if I have two amongst the "others known, and I grant one or both of them, the grant is good, "for this, that it is ascertained what thing is granted."

Lord Coke (*f*) uses a very similar illustration: "If I have three "horses, and I give you one of them, in this case the election ought

(*c*) They are nearly, but not quite equivalent to the text of the Digest: Si id quod venierit appareat quid quale quantum sit et pretium et pure venit perfecta est emptio. "When the thing to be transferred under the contract of sale has been ascertained in its individuality, its state, and its quantity and the price is fixed and the transference is to be unconditional, the contract amounts to a perfect sale;" but as this concise statement requires a good deal of explanation, the reader is referred to the extracts from Pothier, *post*.

(*d*) The individuality of the thing to be delivered. as Lord Ellenborough put it, in *Busk* v. *Davis*, 2 M. & S. 403.

(*e*) 18 Ed. 4, 14.

(*f*) *Heywood's Case*, 2 Coke, 36.

"to be made in the lifetime of the parties, for inasmuch as none of "the horses is given in certain, the certainty, and thereby the prop-"erty, begins by election."

It makes no difference, although the goods are so far ascertained, that the parties have agreed that they shall be taken from some specified larger stock. In such a case the reason still applies: the parties did not intend to transfer the property in one portion of the stock more than in another, and the law which only gives effect to their intention, does not transfer the property in any individual portion.

Thus in *White* v. *Wilks* (*g*), in 1813, where the agreement was for the sale of 20 tons of oil in the vendor's cisterns and *in [*126] point of fact the vendor had many cisterns with much more than 20 tons in them. Sir J. Mansfield, C. J., held, at Nisi Prius, that no property had passed to the purchaser, because the contract did not attach on any particular portion of oil, and the Court of Common Pleas approved of this decision. And in *Busk* v. *Davis* (*h*), in 1814, in which case the agreement was for the sale of "ten tons of Riga flax, marked P. D. R., at Davis's wharf, ex Vrow Maria," and the vendors had more than 10 tons of flax of this description lying at Davis's wharf, in mats varying in size; and nothing was done to sever ten tons from the rest; the King's Bench decided that no property passed. Lord Ellenborough said, "The flax was to be "weighed, and the portion of the entire bulk to be delivered was to "be ascertained, and if the weight of any number of unbroken "mats was insufficient to satisfy the quantity agreed upon, it would "have been necessary to break open some mats in order to make up "that quantity. Therefore it was impossible for the purchaser to "say that any precise number of mats belonged exclusively to him. "If the weight did not divide itself in an integral manner, it would "be necessary to break up and take some fraction of another mat: "every component part, therefore, was uncertain;" and Le Blanc, J., remarked, that everything required to make a complete sale had been done but one. "It was to be ascertained what goods the ven-"dee was to have; now that is the point where the case is defec-"tive * * * something was to be done to ascertain the individ-"uality."

Several similar decisions were come to about the same time: *Wallace* v. *Breeds* (*i*), *Austen* v. *Craven* (*k*), and *Shepley* v. *Davies* (*l*), *Boswell* v. *Kilborn*, in 1862 (*m*).

The case, however, of *Whitehouse* v. *Frost* (*n*), decided by the

(*g*) *White* v. *Wilks*, 5 Taunt. 176.
(*h*) *Busk* v. *Davis*, 2 M. & S. 397.
(*i*) *Wallace* v. *Breeds*, in 1811, 13 East, 522.
(*k*) *Austen* v. *Craven*, in 1812, 4 Taunt. 644.
(*l*) *Shepley* v. *Davies*, in 1814, 5 Taunt. 617.
(*m*) *Boswell* v. *Kilborn*, 15 Moo. P. C. C. 309
(*n*) *Whitehouse* v. *Frost*, 12 East, 614.

[*127] Court of King's Bench in 1810, does not seem very *consistent with the others [and is usually referred to with disapproval.]

In that case J. and L. Frost had entered into a contract to sell oil to Townsend, proved by this note, delivered by them to Townsend:—"Mr. J. Townsend, bought of J. and L. Frost, ten tons of Greenland oil in Mr. Staniforth's cisterns, at your risk, at 39*l.*—390*l.*" At the time of the agreement, there were in this cistern forty tons of oil, the whole of which had formerly belonged to Dutton and Bancroft. Dutton and Bancroft had sold ten tons of this oil to J. and L. Frost, and J. and L. Frost gave Townsend a delivery order on Dutton and Bancroft for "the ten tons of oil we bought of you." Nothing whatever was done to sever the ten tons from the rest of the forty. The King's Bench decided that as between Frost and Townsend the property had passed.

The Court of Common Pleas in *White* v. *Wilks* (*a*), and *Austen* v. *Craven* (*b*), expressed themselves much dissatisfied with this decision, which they considered inconsistent with and overruled by the other decisions; but [Le Blanc, J.] one of the Judges who decided *Whitehouse* v. *Frost* (*c*), subsequently, in *Busk* v. *Davis* (*d*), explained the case on a principle quite consistent with the other cases, though it may be doubted whether the facts of the case of *Whitehouse* v. *Frost* (*c*) as reported quite justify the distinction. "In *Whitehouse* v. *Frost* (*c*)," said he, "the owner of a large "quantity of oil in the mass sold a certain quantity of it to B., who "contracted to sell the same to C., *specifically as an undivided* "*quantity*, and gave him an order upon the owner for the delivery, "which order the owner accepted. The question that arose was not "between the owner and B., but between C. and B., who as far as it "was in his power had done every act to complete the delivery, for "he only *pretended to sell an undivided quantity*. Therefore, what-[*128] "ever might *have been the case as between the owner and "B., the Court were of opinion that, as between the subvendee and "B., the sale was complete." In the reported case no mention is made of there being any proof whatever of the agreement being to sell, not ten tons out of forty, but an undivided fourth part of every portion of the forty tons; unless the phrase "at your risk" bears that meaning. J. and L. Frost seem to have professed to sell and deliver ten tons of oil belonging to them in Staniforth's cistern; and their defence to the action was, that they had no such oil, because it still remained the property of Dutton and Bancroft. It may be doubted whether they were not estopped from setting up such a defence against their own agreement, but the decision does not seem to have been given on that ground.

(*a*) *White* v. *Wilks*, in 1813, 5 Taunt. 176.
(*b*) *Austen* v. *Craven*, in 1812, 4 Taunt. 644.
(*c*) *Whitehouse* v. *Frost*, 12 East, 614.
(*d*) *Busk* v. *Davis*, in 1814, 2 M. & S. 397.

Subsequent Appropriation.

[The property will not pass until the goods have been specified, but the goods may be appropriated (*a*) or identified or specified as the goods on which the contract is to operate, subsequently to the making of the contract, either by the assent of both parties or by the vendor's determination of an election. And when they have been made specific, the presumption being that the property was intended to pass, the property will pass, unless there is something to show that it was the intention of the parties that it should not pass. Some of the cases following are authorities for both the propositions.]

It has been already said that the specific goods must be agreed upon; that is, both parties must be pledged, the one *to give [*129] and the other to accept those specific goods. This is obviously just, for until both parties are so agreed, the appropriation cannot be binding upon either; not upon the one, because he has not consented, nor upon the other, because the first is free. But the application of this principle leads to nice and subtle distinctions, which perhaps cannot be helped, but are not the less to be lamented. When the goods are selected from the first in the original agreement there is of course no difficulty on the point, both parties are then bound to apply the contract to those specific goods. Neither is there any difficulty where both parties have subsequently assented to the appropriation of some specific goods to fulfil an agreement that in itself does not ascertain which the goods are to be. The effect is then the same as if the parties had from the first agreed upon a sale of those specific goods. In the accurate language of Holroyd, J. (*o*), "the selection of the goods by the one party and the adoption "of that act by the other, converts that which before was a mere "agreement to sell into an actual sale, and the property thereby "passes."

But the difficulty arises when the original agreement does not ascertain the specific goods, and one party has appropriated some particular goods to the agreement, but the other party has not subsequently assented to such an appropriation. Such an appropriation is revocable by the party who made it and not binding on the other party, unless it was made in pursuance of an authority to

(*a*) [The word "appropriated" bears different meanings. It may mean that the goods have been fixed upon as the subject about which the parties are contracting, and in that case the contract can never apply to any other goods, as in *Laidler* v. *Burlinson*, 2 M. & W. 602, *post*, p. 186; or it may less correctly mean that the vendor had merely intended to fix upon those goods as the subject of the contract, but had not finally elected to do so, as in *Atkinson* v. *Bell*, *post*, p. 131, 8 B. & C. 277, in which case he may alter his intention, and fix upon other goods, see *Anderson* v. *Morice*, L. R. 10 C. P. 58 and 609; 44 L. J. C. P. 10 and 341; 1 Ap. Ca. 619; 46 L. J. C. P. 11; and *Calcutta Co. v. De Mattos*, *post*, p. 236; 32 L. J. Q. B. 322; 33 L. J. Q. B. 214.]

(*o*) *Rhode* v. *Thwaites*, 6 B. & C. 388.

make the election conferred by agreement; or unless the act is subsequently and before its revocation adopted by the other party. In either case it becomes final and irrevocably binding on both parties.

The question of whether there has been a subsequent assent or not, is one of fact; the other question of whether the selection by one party merely showed an intention in that party to appropriate those goods to the contract, or showed a determination of a right of election, is one of law, and sometimes of some nicety.

[*130] *The general rule laid down by Lord Coke in *Heyward's Case* (p), and adopted in *Comyn's Digest, Election*, seems to be, that when from the nature of an agreement an election is to be made, the party, who is by the agreement to do the first act, which from its nature cannot be done till the election is determined, has authority to make the choice in order that he may perform his part of the agreement; when once he has performed the act the choice has been made and the election irrevocably determined; till then he may change his mind as to what the choice shall be, for the agreement gives him till that time to make his choice.

It follows from this, that where from the terms of an executory agreement to sell unspecified goods, the vendor is to dispatch the goods, or to do anything to them that cannot be done till the goods are appropriated, he has the right to choose what the goods shall be; and the property is transferred the moment the dispatch or other act has commenced, for then an appropriation is made, finally and conclusively, by the authority conferred in the agreement, and in Lord Coke's language, "the certainty, and thereby the property "begins by election," *Heyward's Case* (p); but however clearly the vendor may have expressed an intention to choose particular goods, and however expensive may have been his preparations for performing the agreement with those particular goods, yet until the act has actually commenced the appropriation is not final, for it is not made by the authority of the other party, nor binding upon him (q).

The distinction [between a mere intention to appropriate, and a determination of a right of election], which though somewhat subtle seems to be logical, reconciles the two cases of *Fragano* v. *Long* (r) and *Atkinson* v. *Bell* (s), which seem to be on the very boundary line that divides the two principles.

[*131] *In *Fragano* v. *Long* (t), in 1825, Fragano of Naples sent a written order to manufacturers at Birmingham for a quantity of hardware, to be dispatched on insurance being effected. The manufacturers at Birmingham, in pursuance of this order, packed up a cask of hardware and sent it to their shipping agents at Liverpool;

(p) *Heyward's Case*, 2 Co. 36.
(q) This statement of the law was approved by Erle, J., in *Aldridge* v. *Johnson*, 7 E. & B. 885; 26 L. J. Q. B. 296.
(r) *Fragano* v. *Long*, 4 B. & C. 219.
(s) *Atkinson* v. *Bell*, 8 B. & C. 277.
(t) *Fragano* v. *Long*, 4 B. & C. 219.

it was marked with Fragano's initials, and insured on his account. The shipping agents were putting the goods on board a vessel, when, by the fault of the defendant, they were injured, and an action being brought for this wrong in Fragano's name, it was contended that it was ill brought, because the property in the goods, at the time they were injured, had not yet vested in Fragano; but the Court of King's Bench decided that the property was in Fragano from the moment the goods by his direction left the vendor's warehouse at Birmingham.

In *Atkinson* v. *Bell* (*u*), before the same Judges in 1828, it was proved that Bell, the defendant, had ordered two machines to be made by Sleddon, after the pattern most approved of by a person called Kaye. Sleddon completed two machines; he afterwards altered them to suit some alteration in Kaye's machines. He then packed them in boxes, and wrote to Bell to say they were ready, and to ask by what conveyance they were to be sent. Sleddon then became bankrupt, and his assignees having brought an action for goods bargained and sold against Bell, the Court of King's Bench, with some apparent reluctance, decided that the form of action would not lie, as there was no bargain and sale. The goods remained Sleddon's goods, though he had intended them for Bell, and informed him of that intention.

There can be no doubt that Sleddon had, as far as intention could do it, appropriated the goods to Bell as firmly as the vendors had appropriated them to Fragano in the other case, and probably he had been at more expense in consequenco of such an intended appropriation; but Fragano's bargain was, that the goods should be dispatched, and his *vendor had begun to dispatch them. [*132] Sleddon had done nothing under his contract with Bell: he had only made great preparations for doing something. For all that had been done, Sleddon might still have supplied Bell with any two other machines answering the description; but if Bell had assented to the appropriation of these two machines the case would have been different.

[In the following cases the question whether a subsequent assent had been given was considered.

In *Rhode* v. *Thwaites* (*x*), in 1827, the purchaser bought twenty hogsheads of sugar, to be filled and delivered by the vendor. The vendor filled and delivered four, and subsequently filled sixteen others, and wrote to the purchaser to take them away, and the purchaser promised to do so. It was held that the property passed.

In *Elliott* v. *Pybus* (*y*), in 1834, the property was held to have passed where the vendee, having ordered a machine to be made, admitted when it was finished that it was made according to order,

(*u*) *Atkinson* v. *Bell*, 8 B. & C. 277.
(*x*) *Rhode* v. *Thwaites*, 6 B. & C. 388; 9 D. & R. 293.
(*y*) *Elliott* v. *Pybus*, 10 Bing. 512.

made a part-payment on account, and requested the vendor to deliver it before the balance was paid (*z*).]

Sparkes v. *Marshall* (*a*), in 1836, was an action on a policy of insurance, and the question was, whether the plaintiff had, at the time of making the policy, any property in a particular cargo of oats. Bamford, a corn merchant, had bought of John and Son, of Youghal, 500 to 700 barrels of prepared black oats, to be shipped by them as they could get a vessel. Bamford sold to the plaintiff, on the 10th of November, 500 to 700 barrels of oats, described as to be shipped by John and Son; and on the 14th of November Bamford wrote to the plaintiff to say that the oats were coming by the Gibraltar, and the plaintiff showed his assent to this by immediately insuring, on his own account, the oats "per Gibraltar, "supposed to be not yet loaded." "The question turns," said [*133] *Tindal, C. J., "upon the right of the plaintiff at the time "of effecting the policy to that specific cargo of oats on board the "Gibraltar. The plaintiff contends that those particular oats were "appropriated to him; the defendant, on the other hand, contends "that no specific cargo of oats was appropriated, that he had only "a right of action against Bamford, and that he could recover the "same damages now in such action, notwithstanding the loss of the "Gibraltar packet . . . . This letter (of November 14th) seems "to us to be an unequivocal appropriation of the oats on board the "Gibraltar by Bamford, and this appropriation is assented to and "adopted by the plaintiff . . . . we therefore think the plaintiff "is entitled to judgment."

[In the following cases the question was, whether the property had passed, the vendor having by the determination of an election, appropriated the goods to the contract.

In *Bryans* v. *Nix* (*b*), in 1839, Miles Tempany, a corn exporter at Longford in Ireland, was in the habit of consigning corn to the plaintiffs in Liverpool for sale on commission, and drawing bills on them against the consignments. On the 31st of January Tempany obtained from the captain of a boat, No. 54, lying at Longford, a boat receipt for 530 barrels of oats stated in the receipt to be then on board, by which they were made deliverable to the plaintiff's agents in Dublin. In fact, there were no oats on board at the time of signing the receipt, for the loading began on the 1st of February. On the 2nd of February, Tempany wrote to the plaintiffs enclosing the boat receipt and a bill drawn on them against these 530 barrels, which they accepted on receipt. On the 6th, 400 barrels had been put on board, and on this day Tempany, being pressed, gave the defendants a delivery order on his agent in Dublin for oats on board No. 54 and other boats. On the 9th the loading was complete, and Tempany induced the captain to sign a new boat receipt, making

(*z*) *Wilkins* v. *Bromhead*, in 1844, 6 M. & G. 963; 7 Scott, N. R. 921.
(*a*) *Sparkes* v. *Marshall*, 2 Bing. N. C. 761.
(*b*) *Bryans* v. *Nix*, 4 M. & W. 775.

the oats deliverable to the defendants, who subsequently obtained possession. The Court *held that the oats had not been [*134] appropriated to the plaintiffs. The grounds of the decision appear to have been that the boat receipt sent to the plaintiffs purported to be an undertaking by the captain to retain for them goods then in his possession, when, in fact, there were none, and was therefore meaningless: and was not evidence of Tempany having appropriated similar goods to them which subsequently came into the captain's possession. And that as to these goods there was no evidence that Tempany had appropriated them to any one before the 9th, on which day the captain was made the agent of the defendants to hold for them.

In *Aldridge* v. *Johnson* (*c*), in 1857, it was agreed that the plaintiff should give Knights 32 bullocks and a sum of 23*l.*, and should have in exchange 100 qrs. of oats forming part of a bulk of 200 to 300 qrs. then lying in Knights' warehouse. The plaintiff sent sacks for the oats, of which 155 were filled by Knights' orders. Knights then finding himself in embarrassed circumstances, had the sacks emptied back into the bulk, and subsequently the defendant, his assignee in bankruptcy, claimed the oats. But the Court held that the property had passed to the plaintiff. Erle, J., said the decisive act was putting the portion into the sacks.

The case of *Langton* v. *Higgins* (*d*), in 1859, followed *Aldridge* v. *Johnson* (*c*). Bottles which the plaintiff had sent to be filled with peppermint oil, were filled and weighed, and the Court held the property had passed.

In *Falk* v. *Fletcher* (*e*), in 1865, De Mattos, of London, chartered a vessel from the defendants, to load a cargo of salt at Liverpool, and proceed with it to Calcutta. The captain was to apply to the plaintiff at Liverpool for a cargo. The course of business between the plaintiff and De Mattos was for the plaintiff to put the salt on board any ship chartered by De Mattos, to take the mate's receipts for the quantities as put on board, exchanging them afterwards *for a bill of lading making the salt deliverable to the plain- [*135] tiff or his assigns, and to send it and the invoice to De Mattos, together with a draft for his acceptance.

In this case the plaintiff had put on board 1,007 tons of salt when he heard that De Mattos had stopped payment; he immediately stopped loading, and proposed to the defendants either that he should complete the loading on his own account, or that they should purchase the salt already on board, or give him a bill of lading for that quantity, but defendants declined all his proposals and sailed for Calcutta, where the salt was sold at a loss by their agents. It was contended for the defendants that the property in the salt had passed to De Mattos by delivery on board the vessel

(*c*) *Aldridge* v. *Johnson*, 7 E. & Bl. 885; 26 L. J. Q. B. 296.
(*d*) *Langton* v. *Higgins*, 28 L. J. Ex. 252; 4 H. & N. 402.
(*e*) *Falk* v. *Fletcher*, 18 C. B. N. S. 403; 34 L. J. C. P. 146.

(*f*), and that taking the mate's receipts was nothing more than a means of ascertaining the quantities. The jury found a verdict for the plaintiff on the ground that he did not intend when he put the salt on board to pass the property to De Mattos or to part with control of it, and the Court refused to grant a new trial.

In *Campbell* v. *The Mersey Docks and Harbour Board* (*g*), in 1863, the plaintiff had purchased 250 bales of cotton out of a cargo of 500. When the 500 bales were landed, they were all marked in one way and not numbered, but the dock company's servants numbered them at the time of landing. The Company gave the plaintiff a warehouse certificate for 250 bales, describing them as numbered from 1 to 250. Subsequently the Company informed the plaintiff that 200 of the 250 bales numbered 1 to 250 had been inadvertently delivered to other persons, and offered to substitute other numbers, which offer the plaintiff declined. The jury found that the only evidence of an appropriation was a mistake of the Company's clerk, and on the motion it was held that the property had not passed.

In *Ex parte Pearson, in re The Wiltshire Iron Co.* (*h*), in 1868, [*136] Pearson, who was unaware that a petition for winding *up the Wiltshire Iron Co. had been presented, purchased 200 tons of iron from the Company, who placed the iron in trucks and sent invoices to Pearson signifying the consignment. The trucks were moved from the Company's works on to the line of the Great Western Railway Co., in whose custody they were when the winding-up order was made. It was held the property had passed.

In *Jenner* v. *Smith* (*i*), in 1869, the plaintiff showed the defendant a sample of hops of which he then had three pockets lying in a London warehouse. The defendant agreed to buy two of them at £7 15*s.* per cwt.: they were to be left in the warehouse until he wrote for them. Some days afterwards, the plaintiff instructed the warehouseman to set apart two of the pockets, which was done, and a card with the defendant's name was placed on them, but they were not transferred in the warehouse books. Subsequently the plaintiff sent the defendant an invoice showing the weights, but there was nothing to show that the defendant had abandoned his right to see that the bulk corresponded with the sample, or to see them weighed, and the Court held the property had not passed: the defendant had neither assented to the vendor's appropriation, nor given the vendor authority to appropriate for both.

In *Stock* v. *Inglis* (*k*), in 1882, the question was considered at great length, whether the property in bags of sugar had passed

(*f*) See *Moakes* v. *Nicholson*, *post*, p. 161; 19 C. B. N. S. 290; 34 L. J. C. P. 273.

(*g*) *Campbell* v. *Mersey Docks*, 14 C. B. N. S. 412.

(*h*) *Ex parte* v. *Pearson*, *In re Wiltshire Iron Co.*, 3 Ch. App. 443; 37 L. J. Ch. 554.

(*i*) *Jenner* v. *Smith*, L. R. 4 C. P. 270.

(*k*) *Stock* v. *Inglis*, 9 Q. B. D. 708; 12 Q. B. D. 564; 10 Ap. Ca. 263.

where the vendor had not at the time of the loss elected which of certain bags to appropriate to a particular contract.

So far those contracts have been spoken of which operate in law as conveyances of the property, but where the contract is not one which is intended to operate as an assignment or conveyance of the property, but is only a mere promise that an assignment will be made if a certain event shall happen, then, in order that the equitable interest which such a promise is intended to give may be created and pass, *the goods must be specific, to the degree [*137] indicated in the judgments in the following case, just as they must be specific where it is intended that the property shall pass. This is decided by the case of *Holroyd* v. *Marshall* (*l*), in the House of Lords, in 1862, where it was argued that no interest passed because the goods were never sufficiently specified for the contract to attach upon them. Taylor, the occupier of a mill, covenanted to assign to Holroyd, his landlord, machinery which was not in existence at the date of the covenant, but which might thereafter be brought by him into the mill, and the principal question was, whether a mere covenant to assign would be effectual to pass any interest at all; but there was a second question, viz., assuming that it would be effectual to pass an interest in the goods, provided they were sufficiently specific, whether the machinery was sufficiently specific in this particular case. The House of Lords held that the covenant was effectual to pass an equitable interest, and that the goods were sufficiently specific.

The judgment of Lord Westbury, L. C., is most instructive and is again cited in the Chapter on Equitable Assignments (*m*). He said, "A contract for the sale of goods, as, for example, of 500 "chests of tea, is not a contract which would be specifically per-"formed, because it does not relate to any chests of tea in particu-"lar; but a contract to sell 500 chests of the particular kind of tea "which is now in my warehouse in Gloucester, is a contract relating "to specific property, and which would be specifically performed."

In *Lunn* v. *Thornton* (*n*), in 1845, there was a covenant which was in terms, that one party "sold and delivered" goods which he then had or thereafter might have. The action was trover, which put in issue the fact whether the property in the after-acquired goods had passed, and the Court of Common Pleas held that it had not. This case is quite consistent with the preceding one. At *law* the property had not passed.

*The case of *Belding* v. *Read* (*o*), in 1865, seems hardly [*138] consistent with the law as laid down in *Holroyd* v. *Marshall* (*p*), and is probably not good law so far as it relates to the household furniture (*q*). There the debtor made an assignment of all his

(*l*) *Holroyd* v. *Marshall*, 10 H. L. R. 191; 33 L. J. Ch. 193.
(*m*) *Post*, p. 300.
(*n*) *Lunn* v. *Thornton*, 1 C. B. 379; 14 L. J. C. P. 161.
(*o*) *Belding* v. *Read*, 3 H. & C. 955; 34 L. J. Ex. 212.
(*p*) *Holroyd* v. *Marshall*, 10 H. L. R. 191; 33 L. J. Ch. 193.

household furniture, &c., then being or thereafter to be upon his dwelling-house at Reedham or elsewhere in the United Kingdom. Subsequently one of his creditors seized goods in the house, and a horse and gig standing at livery at Yarmouth, all of which had been purchased after the agreement. The Court held that the agreement did not attach on those goods, for they had never become specific as in *Holroyd* v. *Marshall* (*p*).

Leatham v. *Amor* (*r*), in 1878, was a very similar case to *Holroyd* v. *Marshall* (*s*).

In the case of *In re Count D'Epineuil* (*t*), in 1882, Fry, J., held that a charge in favour of a creditor of all present and future personality was effectual only to charge the property which belonged to the debtor at the date of the agreement (*u*).]

There may possibly be some doubt whether the true principle of those cases, which settle that goods dispatched by the vendor are the property of the purchaser, is, that the vendor has by dispatching them, exercised and determined a right of election, though it is difficult on any other principle to reconcile them with those cases which decide that a delivery to a carrier, and a receipt by him, do not make a contract good within the Statute of Frauds. For if the principle were that the carrier had authority from the purchaser to [*139] consent to an appropriation, he would surely have *authority also to *accept* the goods within the meaning of the statute, but that it is settled he has not (*x*).

[That the dispatch does vest the property in the purchaser] there can be no doubt. As long since as 1803, Lord Alvanley, in delivering the judgment of the Court, in *Dutton* v. *Solomonson* (*y*), said, "When this point was first mentioned I was surprised, for it appeared to me to be a proposition as well settled as any in the law, "that if a tradesman order goods to be sent by carrier, though he "does not name any carrier, the moment the goods are delivered to "the carrier it operates as a delivery to the purchaser, the whole "property immediately vests in him: he alone can bring an action "for any injury done to the goods, and if any accident happen to the "goods it is at his risk. The only exception to the purchaser's "right over the goods, is, that the vendor, in the case of the former "becoming insolvent, may stop them *in transitu*. On this part of "the case, therefore, the Court has never entertained any doubt." It is to be observed that Lord Alvanley joins two propositions to-

(*q*) *Reeves* v. *Barlow*, in 1884, 11 Q. B. D. 510; 12 Q. B. D. 436.

(*r*) *Leatham* v. *Amor*, 47 L. J. Q. B. 581.

(*s*) *Holroyd* v. *Marshall*, 10 H. L. R. 191; 33 L. J. Ch. 193. See also *Lazarus* v. *Andrade*, in 1880, 5 C. P. D. 318; 49 L. J. C. P. 847; *Clements* v. *Matthews*, in 1883, 11 Q. B. D. 808; 52 L. J. Q. B. 772; *Reeves* v. *Barlow*, in 1884, 11 Q. B. D 610; 12 Q. B. D. 436.

(*t*) *In re Count D'Epineuil*, 20 Ch. D. 758.

(*u*) *In re Panama, New Zealand and Australian Royal Mail Co.*, in 1870, 5 Ch. Ap. 322; 39 L. J. Ch. 482.

(*x*) *Ante*, p. 22.

(*y*) *Dutton* v. *Solomonson*, 3 B. & P. 582.

gether (both perfectly undoubted law): that when goods are by agreement to be sent by a carrier, the delivery of the goods to the carrier appropriates the goods to the purchaser, and vests the property in him, and that it is a delivery to the purchaser; that the goods are both sold and delivered. In most of the cases both of these things existed; at the moment of time when it became necessary to determine whose property the goods were, they were both sold and also delivered, but to the carrier, and therefore only *in transitu:* but it was not so in *Fragano* v. *Long* (*z*), [where the goods were appropriated, but were still in the hands of the vendor's agents]. There was in that case an objection made that the property remained in the vendor, because he and his agents still retained the possession of the goods, so as never to have parted with his rights as an unpaid vendor. Bayley, J., expressly says that there might be a difficulty as to that, if the *vendor and his [*140] shipping agents were setting up an adverse interest, but not in the present case. The decision, therefore, in that case was, that the goods were bargained and sold, and that it was not material to inquire whether the *transitus* had commenced or not. This is not a merely theoretical distinction: a trader who receives an order for goods of a particular description, to be dispatched by sea, very often with a view of preserving his lien, has the bills of lading made out to his own order, so as to secure that the goods shall not be delivered till paid for, and it is worth consideration under what circumstances by doing so he prevents the shipment operating as an appropriation of the specific goods, and so retains in himself the general property, and consequently the liability to loss during the voyage.

If the reason why the delivery of the goods to the carrier appropriates them to the contract of sale and vests the property in the purchaser, is that the carrier is an agent of the purchaser, having authority to receive the goods for him, it follows that when the carrier receives the goods under a contract with the vendor, by which he agrees to keep possession of the goods subject to the vendor's orders, the property is not transferred, for in such a case it is clear that the carrier does not receive the goods as an agent for the purchaser.

But this consequence does not necessarily follow, if the reason why the delivery of the goods to the carrier appropriates the goods and vests them in the purchaser, is that it amounts to a determination of a right of election given to the vendor by the contract under which he is to dispatch the goods. The vendor's attempt to retain a right of possession may sometimes prevent the delivery to the carrier from operating as a determination of the vendor's right of election, but it will not necessarily do so. Whether it does or not must depend upon the intention with which they were delivered, and the terms of the contract by which the vendor is bound to dispatch them.

(*z*) *Fragano* v. *Long*, 4 B. & C. 219, *ante*, p. 131.

In some cases the terms of the agreement of sale prevent any [*141] question from arising. Thus in *Swain* v. *Shepherd* (*a*), *in 1832, at Nisi Prius, before Parke, B., in which the vendor sued the carrier for the loss of the goods, the learned Judge told the jury that if they believed the evidence that the goods were sent on a contract of sale if approved of, if not to be returned, the plaintiff was the proper party to sue. It is quite obvious that the circumstance of a carrier intervening in this case was purely accidental, and had nothing to do with the vesting of the property. If the vendor had literally with his own hands delivered them into the hands of the purchaser on those terms, the property must have remained in the vendor until the purchaser had approved of the goods, or failed to return them.

In all cases the terms of the agreement are of great consequence, for the first question is, whether the goods have been appropriated pursuant to the authority conferred by the agreement, so as to vest the general property in the purchaser, and then it may become a farther question how far the terms with which the vendor has clogged the appropriation are binding or not, and that too must depend upon the terms of the agreement.

[Now in considering whether an intention to pass the property existed in any contract, it will be well to contrast two classes of cases, firstly, where the vendor delivers direct to the vendee or his agent without the intervention of a third person acting as the agent of neither but as a carrier, and secondly, where such a person does intervene. For the vendor's interest in these two cases may probably not be the same.

If no carrier intervenes, the unpaid vendor until he has parted with the possession, has at least his lien for the purchase money, and may withhold the goods until he is paid, notwithstanding that the property may have passed, and may have by the terms of the contract with the vendee, a further right to retain possession until the happening of some event, and this also although the property may have passed, and, therefore, in the majority of cases it is to his advantage to have passed the property, and with it the risk.

[*142] In the case of *Sweeting* v. *Turner* (*b*), in 1872, *Blackburn, J., said, "It is thoroughly established that by the English law, "where a bargain and sale is completed with respect to goods, and "everything to be done on the part of the vendor before the pro-"perty should pass has been performed, then the property vests in "the purchaser, although the vendor still retains his lien, the price "of the goods not having been paid; and any accident happening "to the things subsequently, unless it is caused by the default of "vendor—any calamity befalling them after the sale is completed "—must be borne by the purchaser, and, by parity of reasoning, "any benefit to them is his benefit, and not that of the vendor."

(*a*) *Swain* v. *Shepherd*, 1 M. & R. 223.
(*b*) *Sweeting* v. *Turner*, L. R. 7 Q. B. 310; 41 L. J. Q. B. 58.

But where a carrier intervenes, the vendor's interest is rather the other way. If the vendor delivers the goods into the carrier's hands, and the property has passed, his lien (*c*) is gone, for he has parted with the possession to the carrier, and any right given him by contract to withhold possession is not one of which the carrier can, acting on the vendor's behalf, avail himself, and the vendee has the right to demand the goods from the carrier. In this case, therefore, it is to the vendor's interest that the property should not have passed.

When, therefore, the vendor delivers the goods to the carrier instructing him to deliver them to him, the vendor, or his agent, at the other end of the journey, the presumption is that the property was not intended to pass. The commonest case of this sort is where the shipper or consignor takes a bill of lading from the captain making the goods deliverable to himself or his agent. This reservation of control over the goods by retaining the property in them appears to be identical with that which Mr. Benjamin speaks of as the reservation of the *jus disponendi.*

The vendor cannot protect himself where the property *has [*143] passed, by saying to the carrier, "do not deliver the goods to the vendee, but deliver them to my agent," and by the carrier agreeing to this; such a contract might be good between the carrier and the vendor, but it could not deprive the vendee of such rights as the contract with the vendor has already given him, and the carrier would be a wrongdoer in withholding delivery.]

It is probable that the law would be the same if the goods were delivered to a carrier by land, for as far as regards the vesting of the property, the bill of lading has no peculiar legal effect: it is a direction to the shipowner as to the person to whom he is to give the goods, and a contract on his part to give them according to that direction, and has precisely the same effect on the vesting of the property, that a verbal agreement to the same effect would have had. It is very strong evidence of what the shipper intended in shipping the goods, but his intention has not the more effect because it is expressed in the shape of a bill of lading. If the vendor and the purchaser have come to the binding agreement, that the purchaser is to have forthwith certain goods, the vendor cannot without the consent of the purchaser, add fresh conditions; and if he orders the actual holder to keep back the goods till the purchaser has done something, which he is not bound to do, the order is void, and the holder obeys it at his peril, and it is no matter that the holder is a shipowner, and the order in the shape of a bill of lading. The purchaser has a right to say to the shipowner or captain, "they are my goods, give me them; if you have made

(*c*) A lien is a personal right which cannot be parted with, and continues only so long as the possessor holds the goods, *per* Parke, B., in *Legg* v. *Evans*, in 1840, 6 M. & W. 42. See also *Donald* v. *Suckling*, in 1866, L. R. 1 Q. B. 603; 35 L. J. Q. B. 232.

"promises to the shipper inconsistent with my rights, look you to "that." But the case is quite different if the original bargain rendered either the passing of the property or the right of possession conditional. The vendor then has a right to insist as against the purchaser on the fulfilment of those conditions contained in the original bargain, and the form of the bill of lading is of great weight as evidence, to show whether he insists upon that right. Neither is there any peculiar legal effect in an invoice, but the terms of the invoice afford very strong evidence of what the terms [*144] of the agreement of sale are, and *also of the vendor's intention to appropriate the specific goods, and the question, whether the directions not to deliver are contrary to the bargain, is, therefore, often decided by the terms of the invoice as a matter of evidence. Bearing these matters in mind, it is not difficult to reconcile *Coxe* v. *Harden* (*d*), with *Brandt* v. *Bowlby* (*e*), though at first glance they seem directly opposed to each other.

[If, for example, the vendor had contracted to sell 1,000 qrs. of wheat, and had put 1,000 qrs. on board, it is a question of fact whether those 1,000 qrs. had been ascertained or specified as the subject of the contract: if they have, then the vendor can tender them, only, and the vendee is bound to accept them, only. But it is a further question of fact whether the property has passed. It will pass unless the vendor has shown that it was his intention that it should not pass. Then comes the question whether the vendor had any right or power to give effect to that intention. That must depend on the contract. The vendor cannot vary it at pleasure. If the intention of the parties to be gathered from the terms of the contract was, that the property should pass at once, or when placed on board, or when delivered at a certain port, or where bills drawn against the goods had been accepted, or when bills drawn against the goods had been paid, or on the happening of any other event, it is not in the vendor's power to vary the contract, or, as it is sometimes expressed, to vary the consignment, and to say that the property shall pass at some time other than that agreed upon. But if he has the right to give effect to that intention consistently with the contract, he can do so; and the question is one of fact, Did such an intention exist? Of this the terms of the bill of lading are very strong evidence. But all cases of consignment are not from a vendor to a vendee. In many cases a consignor consigns to an agent, and not to a vendee, and raises money on the consign- [*145] ment by drawing on his agent, negotiating the bills with *a bank, and pledging the bills of lading with the bank as security; and this he may do on any terms he may choose, for he is consigning to his own servant.

A letter to the Bank authorising them to sell the consignment in case the bills are not paid is the ordinary letter of hypothecation

(*d*) *Coxe* v. *Harden*, 4 East, 211, *post*, p. 146.
(*e*) *Brandt* v. *Bowlby*, 2 B. & Ad. 932, *post*, p. 150.

If the letter authorises the Bank to sell all consignments for which bills of lading may in future come into their hands, it is called a general letter of hypothecation.]

There are two early cases on this subject which seem to have been decided upon the same principle. In each of them the Court decided that both the property and right of possession were vested in the purchaser and consignee, whilst in *Brandt* v. *Bowlby* (*f*) the judgment of the Court was, that neither was vested, and in *Wilmshurst* v. *Bowker* (*g*), that only the right of property was vested; but the principle seems to be the same. The Court seem to have considered the correspondence and evidence carefully to see whether the goods were shipped with the intent to appropriate them to the agreement, and then to have considered whether the vendor, under the agreement, had a right to retain the possession, for the facts showed beyond a doubt that he had a wish to do so.

The first of those cases was *Walley* v. *Montgomery* (*h*), in 1803. The facts, as reported, were, that Walley, at Liverpool, gave Schumann and Co., of Memel, an order for timber. Schumann and Co. wrote to him on the 1st of May to say they had chartered on his account the ship *Esther;* and on the 15th May they wrote him another letter, enclosing a bill of lading and an invoice, and informing him that they had drawn on him at three months for the price of the timber; none of those letters are set out in the report, which greatly lessens its value. The invoice was of this tenor: "Memel, 9th May. Invoice of a cargo of timber shipped by order and for account and risk of Mr. T. Walley, at Liverpool, in the *Esther;*" and the bill of lading was "to order or *assigns, [*146] he or they paying freight," and was indorsed in blank by Schumann and Co. Schumann and Co. sent their correspondent, Montgomery, another bill of lading, under which and by their directions he got possession of the cargo. Walley, who was not insolvent, demanded the goods of Montgomery, and offered to accept the drafts drawn on him by Schumann and Co., but Montgomery refused to let him have them unless he would pay ready money. Walley would not pay ready money; he did not tender the freight which Montgomery paid. Montgomery sold the cargo, and Walley brought trover against him, and the question was, whether Walley had the right of property and possession in the cargo or not. Montgomery seems to have been treated by the Court as identified in interest with Schumann and Co. Lord Ellenborough, at the trial, looking at the correspondence and the bill of lading only, thought Schumann and Co. had appropriated the goods to be Walley's if he accepted the bills and paid the freight, and not till then. He had offered to accept the bills, so that the first condition was fulfilled; but he had not offered to pay the freight, and therefore he was non-

(*f*) *Brandt* v. *Bowlby*, 2 B. & Ad. 932, *post*, p. 150.
(*g*) *Wilmshurst* v. *Bowker*, 7 M. & G. 882; 8 Scott, N. R. 571, *post*, p. 152.
(*h*) *Walley* v. *Montgomery*, 3 East, 585.

suited. The King's Bench granted a new trial. Lord Ellenborough said that he should have retained his opinion had it not been for the invoice, to which his attention had not been called at the trial; he thought that showed that the appropriation was absolute. Grose, J., said, "The defendant was the mere agent of "Schumann and Co., out of whom the property was divested by "the bill of lading and invoice, and the delivery to the captain for "every purpose except that of stopping *in transitu.* * * * "No man can make another his debtor against his will * * * "there was no duty in the plaintiff to pay the defendant the freight, "because he was a *tort fesor:* standing as Schumann and Co. he "was detaining the goods from the plaintiff after having passed "the property to him."

The other case was *Coxe* v. *Harden* (*i*), also in 1803. In that case [*147] Browne and Co. of Rotterdam, had an order from *Oddy and Co. of London for flax. The terms of the order are not given in the report, nor the manner in which the first part of it was performed. On the 12th of February, 1802, Browne and Co. wrote to Oddy and Co. as follows: "We have the pleasure of handing to you a bill of lading, and invoice of the remainder of the flax we purchased for your account, by order of Mr. Oddy, consisting of eighteen mats, which are shipped in Vrow Jeannette for your place, the amount being 317*l.* 0*s.* 10*d.* We have this day drawn on you at two usances in favour of Lacon, Fisher and Co., not doubting it will meet due honor." The bill of lading which was sent to Oddy and Co. was unindorsed, and Oddy and Co. being in difficulties, transferred it to Harden the defendant, who, as the bill was unindorsed, stood in exactly the position of Oddy and Co. Then Oddy and Co. failed, and Browne and Co. having transmitted an indorsed bill of lading to Coxe, he brought trover against Harden, who had obtained possession of the goods by means of the unindorsed bill of lading. The Court of King's Bench thought Coxe could not sue in his own name, but they said it was not necessary to decide that, for Browne and Co. could not have sued in their own name. As Harden had actually received the goods, no question on stoppage *in transitu* arose, and the question in the case was, whether the right of property and possession in the goods, had passed from Browne and Co. to Oddy and Co. or not. Neither the terms of the order nor of the invoice are given in the report, but in argument it is asserted, "that the property was vested in them without any words of condition annexed, *scilicet* if they honored the bill," and each of the judges assumes in his judgment as a starting point, that it was clear that Oddy and Co., if they continued solvent, were to have immediate possession. It seems, therefore, not too much to infer, that the original agreement was one by which the vendors were not to retain a right of possession till the bills were honored; and, consequently, that the directions to

(*i*) *Coxe* v. *Harden*, 4 East, 211.

the captain not to deliver to Oddy and Co., signified by the bill of lading being unindorsed, were no part of the bargain, and not such as (if *Oddy and Co. had continued solvent), could have [*148] been enforced against them.

In the case of the *Constantia*, in 1807 (*k*), Lord Stowell pointed out the great importance of the terms of the contract of sale, upon the right of the consignor to control the goods after they have been put on board ship. In that case, some brandy taken on board the ship, was claimed by a neutral, Kye, who was the consignee. The captors insisted that the brandy remained the property of the consignor, who was an enemy. The facts seem to have been, that Kye ordered the brandy of the consignor, who put it on board the ship at Cette, and had bills of lading made out, which expressed that the brandy was shipped on account of Kye, and at his risk. Drafts were drawn by Kye's directions on his correspondent, who dishonored them by mistake, and the consignor, under a mistaken idea that Kye was insolvent, took legal steps in Cette, by which the master of the ship was ordered not to deliver the goods to Kye, but to the consignor's agent: the order of revocation was peremptory. It was proved that Kye was in reality solvent, and that the consignor was under a mistake. The letters containing Kye's orders for the brandy, were not at first before the Court. Lord Stowell, after pointing out with great clearness that the consignor had, in fact, made a revocation, and that, therefore, the only question was, if he had a right to make it, and that neither by the law of England nor of France, was there an unlimited power of stoppage *in transitu* in the one country, or revendication in the other, except where the purchaser had failed, said that in this case Kye was not insolvent, and, therefore, the goods were Kye's, "unless it can be shown that "the right of the shipper extends further than I have stated it, and "that it amounts to an unlimited right to vary the consignment at "pleasure; where goods are shipped without orders, such a right "exists. The seller, if he may be so described, retains an absolute "power over them, for there is no purchase. But when orders "have been received *and executed, and delivery has been [*149] "made to the master of the ship, and bills of lading signed, the "seller is *functus officio*, except in the peculiar case in which he is "again reinstated by the privileges of the *vendeur primatif*. That "will make it a matter of fundamental importance, that the letters "containing the original order should be produced. The mer-"cantile law I take to be clear and distinct, that the seller has not "a right to vary the consignment, except in the case above stated. "The mischief and inconvenience that would ensue on a contrary "supposition, are extreme. The goods might be put on board, and "might lie at the risk of the consignee for two or three months, "and if the consignor could come and resume them at pleasure,

(*k*) *The Constantia* (*Henrickson*), 6 Rob. 351.

"it would place the consignee in a situation of great disadvant-"age, that he should be exposed to the risk during such a length "of time, for an object that might eventually be defeated at any "moment, by the capricious or interested change of intention in "the breast of the consignor; it would be to expose the consignee "altogether to the mercy of the consignor."

[In *Ogle* v. *Atkinson* (*l*), in 1814, Smidt and Co. of Riga having funds of the plaintiff's in their hands, purchased flax at his request, for which he sent his own ship. Smidt and Co. put the flax on board, telling the captain that it was the property of the plaintiff, and as such the captain received it. They induced the captain to sign bills of lading making the flax deliverable to blank or order, and sent it to their agent in this country with instructions to get the plaintiff's acceptance for 2500*l*., which sum they conceived would be due to them on balance. The plaintiff declined to give his acceptance, and the warehouseman refused to give him possession. The Court held that the property passed absolutely to the plaintiff on delivery on board his ship, Gibbs, C. J., pointing out that if the flax had been delivered to the captain to be the property of the plaintiff on condition that he accepted certain bills, the case would have been different.]

[*150] *In *Craven* v. *Ryder* (*m*), in 1816, the contract was for the sale of 24 hogsheads of sugar, from Craven to French, free on board a British ship, two months' credit. Craven put 24 hogheads on board the defendant's vessel, the George, which was that named by French, but retained the lighterman's receipt, which expressed them to be shipped for and on account of him, Craven. The Court of Common Pleas decided, that Craven had never parted with the right of possession. Gibbs, C. J., said, "that the plaintiffs might refrain "from delivering the goods, unless under such circumstances as "would enable them to recall the goods if they saw occasion." It seems very doubtful whether the property had passed under such circumstances from the vendor so as to free him from the risk of loss, but there was no occasion to decide that in *Craven* v. *Ryder* (*m*). It would seem from *Coxe* v. *Harden* (*n*), that if the goods in *Craven* v. *Ryder* (*m*), were appropriated to the contract, which was on credit, that Craven had no longer power to control the possession; and from the following case of *Brandt* v. *Bowlby* (*o*), it would seem, that the appropriation was not complete by the mere delivery on board the ship, unless it was done with the intention of appropriation.

In *Brandt* v. *Bowlby* (*o*), in 1831, the Court of King's Bench decided that the property in a cargo of wheat remained in the vendor. The decision turned entirely on the peculiar circumstances.

(*l*) *Ogle* v. *Atkinson*, 5 Taunt. 759.
(*m*) *Craven* v. *Ryder*, 6 Taunt. 433.
(*n*) *Coxe* v. *Harden*, 4 East, 211.
(*o*) *Brandt* v. *Bowlby*, 2 B. & Ad. 932.

These seem to have been that Berkeley, of Newcastle, having agreed to purchase wheat of the plaintiffs, merchants at St. Petersburg, payment to be by drafts on London, chartered a vessel of the defendant, Bowlby, and sent it to receive the wheat. Then Berkeley and the agents of the plaintiffs in England quarrelled, and Berkeley wrote to cancel every order he had given (which he had clearly no right to do). The plaintiffs wrote to say that they would nevertheless load the vessel, hoping it would meet Berkeley's *ap- [*151] proval. They did load the vessel, but took the bills of lading to their own order. They sent one of the bills of lading indorsed to their agent, another they sent unindorsed to Berkeley, and at the same time informed him of what they had done, and that they had drawn partly on him and partly on London for the price. Berkeley refused to accept the draft on him, or to allow the house in London to accept on his account. When the ship arrived the price of wheat had risen, and Berkeley obtained the cargo from the defendants against the will of the plaintiffs, whose agents held the indorsed bills of lading. The plaintiffs brought an action on the contract for a delivery contrary to the bill of lading, and recovered as damages the value of the cargo at the port of discharge. The defendants' counsel moved to reduce the damages, because the plaintiffs had no right of possession, in which case the damages should be only nominal, or at least no more than an unpaid vendor's right of possession, in which case the measure of damages should be the invoice; but the Court refused a rule on both points. The Court seems to have come to the conclusion from the correspondence, that the goods were not shipped for the purpose of appropriating them to the fulfilment of the still existing contract which Berkeley had tried to cancel, but for the purpose of offering to Berkeley a substituted contract, which he declined. When once this construction was put upon the facts, the case became identical in principle with *Swain* v. *Shepherd* (*p*).

Ruck v. *Hatfield* (*q*), in 1832, was a case nearly similar to *Craven* v. *Ryder* (*r*). The shipowner there, however, had refused to give a receipt, and it is to be observed, that Lord Tenterden, in his last edition of Abbott on Shipping (*s*) cites the case as an authority that under such circumstances the vendor retains his rights, "at least as against the master of the ship," so that it appears he did not consider it clear that *as against the purchaser, the vendor [*152] could retain any control after shipment.

[In *Alexander* v. *Gardner* (*t*), in 1835. The plaintiffs, merchants in London, contracted to sell to the defendants, butter which they were expecting from Ireland. The broker's note was in these

(*p*) *Swain* v. *Shepherd*, 1 M. & R. 223.
(*q*) *Ruck* v. *Hatfield*, 5 B. & Ald. 632.
(*r*) *Craven* v. *Ryder*, 6 Taunt. 433.
(*s*) Abbott on Shipping, 10th ed., 403.
(*t*) *Alexander* v. *Gardner*, 1 Bing. N. C. 671.

terms :—"London, Oct. 11, 1833. Sold to Messrs. William Gardner and Son, for account of Messrs. Alexander and Co., 200 firkins Murphy and Co.'s Sligo butter, at 71*s.* 6*d.* per cwt., free on board for quality. * * * Payment, bill at two months from the date of landing. To be shipped this month." The butter was not shipped until November, but the defendants waived any objection on that score, and retained the invoice and bill of lading, which had been indorsed to and delivered to them. In December the vessel with the butter on board was wrecked. The Court held that the property had passed to the defendants.]

In *Wilmshurst* v. *Bowker* (*u*), in 1841, the defendants entered into this written contract with the plaintiffs:—"Sold to Messrs. Wilmshurst and Son, about 300 quarters of wheat, as per sample, at 2*l.* 11*s.* per quarter on board. Payment by banker's draft on London, at two months date, to be remitted on receipt of the invoice and bill of lading." The defendants shipped 310 quarters on board a vessel, and took bills of lading deliverable to their order or assigns. They insured the goods, and in pursuance of an agreement with the plaintiffs, charged them with the premiums as well as the price of the wheat. They forwarded an indorsed bill of lading and an invoice to the plaintiffs, who sent them back a draft, but not a banker's draft. The defendants instantly returned it, and resold the wheat at an advanced price. [The plaintiffs having failed in an action in trover (*x*), on the ground that they were not entitled to the possession of the goods, as they had not given the banker's draft, now moved for judgment non obstante veredicto.] [*153] There was no complaint of what *seems to have been the real wrong, the over hasty resale. The Court of Common Pleas, after taking time to consider, decided that the property was in the plaintiffs, but that on the true construction of the contract the defendants were to have a right to retain possession until the delivery of a banker's draft. [On appeal (*y*), the Court seems to have been of the same opinion as the Court of Common Pleas as to the passing of the property, but to have reversed that Court on the construction of the contract. From the shape in which the question came before the Court (a motion for judgment non obstante veredicto), it was a fact admitted on both sides that "the defendants, by order of the plaintiffs, caused the goods to be shipped for the account and at the risk of the plaintiffs," so that the Court had no occasion to decide whether the appropriation owed its validity to a prior authority contained in the agreement, or to a subsequent assent on the part of the plaintiffs. In point of fact, there seems to have been ample evidence of both.

Ellershaw v. *Magniac* (*z*) was tried in 1843, but was not reported

(*u*) *Wilmshurst* v. *Bowker*, 2 M. & G. 792.

(*x*) *Wilmshurst* v. *Bowker*, 5 Bing. N.C. 541.

(*y*) *Wilmshurst* v. *Bowker*, in 1844, 7 M. & G. 882; 8 Scott, N. R. 571; 12 L. J. C. P. 475.

(*z*) *Ellershaw* v. *Magniac*, 6 Ex. 570.

until 1851. The plaintiff, a merchant in Leeds, contracted with J. and J. Cortazzi, who carried on business in London and Odessa, to buy a cargo of linseed. The Odessa partner, before any linseed had been shipped, drew two bills on the plaintiff on account of the linseed, which were accepted by the plaintiff and paid when due. The plaintiff chartered the 'Woodhouse,' and sent her to Odessa to take on the cargo. When she was loaded the Odessa partner wrote to his London partner, "With regard to your sales of linseed, Mr. Ellershaw will receive a part by the 'Woodhouse.'" He then obtained a bill of lading making the cargo deliverable to order or assigns. The Odessa house being in difficulties, indorsed the bill of lading for value to the defendants, who claimed the cargo, as holders, on the arrival of the ship at Hull. The Court, consisting of Lord *Abinger, C. B., and Barons Parke and Alderson, [*154] held that the property had not passed to the plaintiff.

Wait v. *Baker* (*a*), in 1848, is often cited as a leading case on this subject. The defendant, who was a corn factor at Bristol, contracted by letters with Lethbridge, a corn factor at Plymouth, to buy from him 400 to 500 qrs. f. o. b. of barley, at Kingsbridge or neighbouring port, for cash, on handing bills of lading, or acceptance at two months date." Lethbridge was informed, in answer to inquiries, that he was to charter a vessel, and accordingly he chartered the 'Emerald.' The captain signed a bill of lading making the barley deliverable at Bristol, to the order of Lethbridge or assigns, freight as per charter. Lethbridge then went to Bristol, and early in the morning called at the defendant's office, and there left the invoice and an unindorsed bill of lading. He called again later on in the day, when some dispute arose, and although the defendant said he accepted the cargo, and offered to pay cash, Lethbridge declined, and took away the bill of lading and indorsed it to the plaintiffs for value. When the 'Emerald' arrived the defendant obtained possession of part of the cargo. The Court held that the property had not passed to the defendant.

Parke, B., after pointing out that although a delivery to a carrier is, if nothing further takes place, a delivery to the vendee so as to vest the property in him, but that this was not such a case, said, "The delivery of the goods on board the ship was not a delivery "of them to the defendant, but a delivery to the captain of the ves-"sel, to be carried under a bill of lading, and that bill of lading in-"dicated the person for whom they were to be carried. By that "bill of lading the goods were to be carried by the master of the "vessel for and on account of Lethbridge, to be delivered to him in "case the bill of lading should not be assigned, and if it should, "then to the assignee. The goods therefore still continued in pos-"session of the master of the vessel, not as *in the case of [*155] "a common carrier, but as a person carrying them on behalf of "Lethbridge."

(*a*) *Wait* v. *Baker*, 2 Ex. 1; 17 L. J. Ex. 307.

In *Jenkyns* v. *Brown* (*b*), in 1849, the plaintiff, a merchant in London, instructed his agents, Klingender and Co., of New Orleans, to purchase corn. Klingender and Co. did so with their own money, and drew two drafts on the plaintiff. Klingender and Co. took the bills of lading, deliverable to themselves. They then sold the drafts to the defendants, and indorsed the bills of lading to them as security. After the sale of the drafts they sent an invoice to the plaintiff, stating that the corn was "consigned to order, by order, and for account and risk" of the plaintiff. The bills were presented to the plaintiff for acceptance, and accepted, and, together with the bills of lading, were deposited by the defendants with bankers. On the day when the drafts became due the plaintiff called at the bank, demanded the bills of lading, and offered to take up the drafts. He was requested to call again next day, as the drafts had been mislaid, but he did not do so. The drafts, when presented for payment, were dishonoured. The defendants sold the corn, and the Court was of opinion that the property did not pass to the plaintiff, Coleridge, J., in delivering the judgment of the Court, saying, "that taking the bill of lading deliverable to their "own order was nearly conclusive evidence that the consignors did "not intend to pass the property to the consignee."

Turner v. *The Trustees of the Liverpool Docks* (*c*), in 1851, was very similar to *Ellershaw* v. *Magniac* (*d*). The consignees sent their own ship, and the consignors took the bill of lading "unto order, or to our assigns, he or they paying freight for the said goods, viz., for cotton in round bales, cotton in square bales, nothing being owners' property." The invoice stated the cotton to have been shipped "by order and for account" of the vendees, who were at the same time requested to effect insurances.

[*156] *Patterson, J., in delivering the judgment of the Court, said, "There is no doubt that the delivery of goods on board the "purchaser's own ship is a delivery to him, unless the vendor pro-"tects himself by special terms, restraining the effect of such de-"livery. In the present case the vendors, by the terms of the bill "of lading, made the cotton deliverable at Liverpool to their order "or assigns, and there was not therefore a delivery of the cotton "to the purchasers as owners, although there was a delivery on "board their ship."

In *Key* v. *Cotesworth* (*e*), in 1852, Kilgour & Leith, of Glasgow, wished to purchase handkerchiefs from the plaintiffs at Madras. The defendants, at the request of Kilgour & Leith, wrote to the plaintiffs saying, that they, the plaintiffs, might draw on them for the price of the handkerchiefs on enclosing bills of lading. Accordingly the plaintiffs sent a bill of lading, which made the hand-

(*b*) *Jenkyns* v. *Brown*, 14 Q. B. 496; 19 L. J. Q. B. 286.
(*c*) *Turner* v. *The Trustees of the Liverpool Docks*, 6 Ex. 543; 20 L. J. Ex. 393.
(*d*) *Ellershaw* v. *Magniac*, 6 Ex. 570.
(*e*) *Key* v. *Cotesworth*, 7 Ex. 595; 22 L. J. Ex. 4

kerchiefs deliverable to the defendants or their assigns, together with an invoice, which stated them to be "on account and risk" of Kilgour & Leith. Kilgour & Leith stopped payment being indebted to the defendants. The defendants obtained possession of the handkerchiefs under the bill of lading, but declined to accept the drafts, which had been sent by the plaintiffs to their agents, and by them presented to the defendants for acceptance. The defendants having sold the goods, this action was brought to recover the proceeds as money received for the use of the plaintiffs. The plaintiffs were non-suited, and the non-suit was upheld; the Court holding that the acceptance of the bills was not a condition precedent to the passing of the property, and that it had passed to Kilgour & Leith.

It should be noticed here that it was not decided here that the plaintiffs could not have recovered damages for not accepting the drafts, but it was decided that this form of action would not lie.

It was argued for the plaintiffs, that the acceptance of the *bills was a condition subsequent, which, not being perform- [*157] ed, the property was to revert to the plaintiffs, and that it was a question of fact whether the contract was a conditional one; but the Court held that it was an absolute sale, and that there was no question for the jury. There seems to be no reason why parties should not agree to such a condition subsequent, but it must of course be proved.

In *Shuster* v. *McKellar* (*f*), in 1857, the plaintiffs had about 100 tons of spelter lying in Hays' warehouse, which Coles & Co. were desirous of purchasing and shipping to Calcutta. A lighterman, instructed by Coles & Co., obtained from the plaintiffs a delivery order for the spelter on Hays, and gave the plaintiffs an acknowledgment that he had received the delivery order from them, and that he would hand them the mate's receipts. The mate's receipts acknowledged the spelter to have been received from the lighterman, and they were handed to the plaintiffs.

The usual course of business was for Coles & Co. to pay the plaintiffs for the goods, they then had the mate's receipts handed to them, which they attached to the bills of lading, and the bills of lading were then signed. But in this case Coles & Co. fraudulently procured bills of lading to be signed in their favour, and pledged them. The defendants, the ship-owners, refused to deliver the spelter to the plaintiffs, but the Court held that the property had not passed, and upheld a verdict for the plaintiffs.

The case of *Sheridan* v. *The New Quay Co.* (*g*), in 1858, was a very complicated one. It was an action by one who claimed to be a sub-vendee against a railway company for non-delivery. The facts appear to have been that the vendor, Donaldson, took the bill of lading, making the goods deliverable to the vendee, and for-

(*f*) *Shuster* v. *McKellar*, 7 E. & B. 704; 26 L. J. Q. B. 281.
(*g*) *Sheridan* v. *The New Quay Co.*, 4 C. B. N. S. 618; 28 L. J. C. P. 58.

warded it to his bankers, together with a draft, to be delivered to the vendee on his acceptance and payment.

The bankers were unable to find the vendee, and therefore [*158] *returned the bill of lading and draft. In the meantime the plaintiff, who had purchased the goods from the vendee, paid the freight, and employed the defendants, a railway company, to carry the goods for him. The Court held that the property had not passed, and that the defendants, in an action of trover, were not estopped from showing this.

In the following case of *Brown* v. *Hare* (*h*), in 1858, the consignors took the bill of lading in their own names, but the Court held that this had not been done for the purpose of retaining the property.

The defendants, who were merchants in Bristol, entered into a contract with the plaintiffs, who were merchants at Rotterdam, through a broker in Bristol, named Goolden, to purchase 20 tons of rape oil, of which 10 tons were to be shipped free on board at Rotterdam in September, to be paid for by a bill at three months, on delivery to the defendants of the bill of lading. On the 8th, the plaintiffs shipped 5 tons on board the "Sophie," at Rotterdam, and the captain signed a bill of lading, making the oil deliverable "unto shippers' order or their assigns." The bill of lading was indorsed by the plaintiffs, "deliver the contents to the order of Messrs. Hare & Co.," and an invoice was made out stating the oil to have been shipped for account of Hare & Co.; and on the same day, the 8th, the plaintiffs sent by post to Goolden, the bill of lading, an invoice, and a bill of exchange, drawn on the defendants, all of which Goolden received on the evening of the 10th after business hours. On the night of the 9th, the "Sophie" was lost in the Bristol Channel. On the morning of the 11th, Goolden, who knew of her loss, went to the defendant's office and there left the bill of lading, invoice, and bill of exchange. The defendants returned them shortly afterwards, saying they were not liable to pay for the oil. The Court held that the property had passed to the defendants, and that the plaintiffs were entitled to recover, and the judgment was affirmed in the Exchequer Cham- [*159] ber. *Erle, J., delivering the judgment in that Chamber, said: "The real question has been on the intention with "which the bill of lading was taken in this form: whether the "consignor shipped the goods in performance of his contract to "place them 'free on board'; or for the purpose of retaining a "control over them and continuing to be owner contrary to the con- "tract, as in the case of *Wait* v. *Baker* (*i*), and, as is explained in "*Turner* v. *The Trustees of the Liverpool Docks* (*k*), and *Van Casteel*

(*h*) *Brown* v. *Hare*, 3 H. & N. 484; 27 L. J. Ex. 372; 4 H. & N. 822; 29 L. J. Ex. 376.

(*i*) *Wait* v. *Baker*, 2 Ex. 1; 17 L. J. Ex. 307.

(*k*) *Turner* v. *Trustees of Liverpool Docks*, 6 Ex. 543; 20 L. J. Ex. 393.

"v. *Booker* (*l*). The question was one of fact, and must be taken "to have been disposed of at the trial. The only question before "the Court below or before us being, whether the mode of taking "the bill of lading necessarily prevented the property from passing. "In our opinion it did not, under the circumstances."

In *Joyce* v. *Swan* (*m*), in 1864, M'Carter of Londonderry offered to buy 100 tons of guano from Seagrave & Co. of Liverpool, and Seagrave & Co. wrote to him on the 26th of February, saying they would send him 115 tons which they hoped to have on board the 'Anne and Isabella' in a few days. On the 2nd of March, the plaintiff at M'Carter's request effected an insurance on the 115 tons. On the 3rd of March, M'Carter wrote a letter to Seagrave & Co., grumbling about the price. On the 4th of March, Seagrave & Co. took the bill of lading making the guano deliverable at Londonderry to their order or assigns, and made out an invoice as follows: "Particulars of phospho-guano delivered to account of W. M'Carter, Esq." The bill of lading and invoice were sent to a partner in the house of Seagrave & Co., then staying at Belfast. On the evening of the 4th, but whether before or after posting the bill of lading the report does not say, Seagrave & Co. received M'Carter's grumbling letter, and, fearing lest he should refuse the guano, they insured it in their own names. On the 7th the partner in Belfast, who was going on a visit to M'Carter, took *the bill of [*160] lading with him, and M'Carter said he would accept the cargo, and on the 9th, on getting back to business, the bill of lading was indorsed to him. It turned out afterwards that the 'Anne and Isabella' had been wrecked. The defendant contended that M'Carter had no insurable interest (*n*) in the guano, but the jury found that Seagrave & Co. had put it on board with the intention of passing the property to him, and found for the plaintiff. The Court refused to enter a nonsuit or to grant a new trial, Williams, J., saying, "It "was a question for the jury, and I think they were warranted in "assuming that the guano was put on board pursuant to that con-"tract, with the intention of transferring the property from the sel-"lers to the buyer. It is true that the bill of lading was taken in "the names of the sellers, and at the time the insurance was de-"clared was unindorsed. That was a circumstance which was well "worthy the attention of the jury, and might have induced them to "come to a contrary conclusion. But, if they thought that, not-"withstanding this, there were other circumstances sufficiently co-"gent to induce them to come to the conclusion that the property "was intended to pass, I am of opinion that the mere circumstance "of the form of the bill of lading and of the invoice being trans-"mitted to the partner then in Ireland, instead of to M'Carter

(*l*) *Van Casteel* v. *Booker*, 2 Ex. 691; 18 L. J. Ex. 9.
(*m*) *Joyce* v. *Swan*, 17 C. B. N. S. 84.
(*n*) *Seagrave* v. *Union Marine Insurance Co.*, L. R. 1 C. P. 305; 35 L. J. C. P. 172.

"direct, was not sufficient to annihilate the other evidence in the "cause, though it might induce the jury to pause. The cases of "*Wait* v. *Baker* (*o*), *Brown* v. *Hare* (*p*), appear to me clearly to es- "tablish the distinction that, if from all the facts it may fairly be "inferred that the bill of lading was taken in the name of the seller "in order to retain dominion over the goods, that shows that there "was no intention to pass the property; but if the whole of the [*161] "circumstances lead to the conclusion that that was not *the "object, the form of the bill of lading has no influence on the re- "sult."

In *Moakes* v. *Nicholson* (*q*), in 1865, Pope of London, having agreed to purchase coal from Josse at Hull, chartered a ship and sent her Hull. Josse put the coals on board, and wrote to Pope enclosing an invoice and an unstamped bill of lading, by which the cargo was made deliverable to Pope or order: Josse retained a stamped bill of lading, and sent another unstamped bill to his agent, the defendant, who obtained possession of the coal when the ship arrived in the Thames on the ground that Pope had not paid cash according to contract. Pope appears to have sold the coals to the plaintiff before receipt of the unstamped bill of lading, which he subsequently indorsed and delivered to him. There was a dispute as to what were the terms of the contract, and it was left to the jury to say what they were, and the jury found that the contract was for cash against bill of lading, and that Josse did not intend to pass the property to Pope until cash had been paid (*r*). The Court held that the property had not passed to Pope, and that plaintiff was in no better position than Pope. Erle, C. J., said, "The delivery of the coals on board a ship chartered by Pope has "no effect whatever in passing the property. If the intention was "that the ship should be regarded as the warehouse of Josse until "the happening of the event contemplated, viz., the payment of the "price, the putting the coals on board did not alter the position of "the contracting parties" (*s*).

It is worth noticing that neither the terms of the contract nor the complete correspondence are given in the report, yet, as appears from the judgment of Erle, C. J., it was from these that the jury drew the conclusion that there was no intention to pass the property.

In *Ogg* v. *Shuter* (*t*), in 1875, the plaintiffs had contracted [*162] *to purchase potatoes from one Loutre in France to be delivered "free on board" at Dunkirk at a certain price. A payment

(*o*) *Wait* v. *Baker*, 2 Ex. 1; 17 L. J. Ex. 307.
(*p*) *Brown* v. *Hare*, 3 H. & N. 484; 27 L. J. Ex. 372; 4 H. & N. 822; 29 L. J. Ex. 376.
(*q*) *Moakes* v. *Nicholson*, 34 L. J. C. P. 273; 19 C. B. N. S. 290.
(*r*) This is so stated in the judgment of Erle, C. J.
(*s*) See *Falk* v. *Fletcher*, *ante*, p. 134; 18 C. B. N. S. 403; 34 L. J. C. P. 146.
(*t*) *Ogg* v. *Shuter*, L. R. 10 C. P. 159; L. R. 1 C. P. D. 47; 44 L. J. C. P. 161; 45 L. J. C. P. 44.

of 30*l.* was made, and the potatoes were shipped on board the "Blonde" in sacks sent over by the plaintiffs, and a bill of lading taken to order. Loutre indorsed the bill of lading to the defendant with instructions to exchange it for an acceptance for the balance. The plaintiffs had some reason to think that the quantity of potatoes shipped was 16 sacks short, and on this ground declined to accept for the full amount, but offered to do so, if when unloaded, it should appear that the full quantity had been loaded, or to accept at once for the full amount less the price of 16 sacks. The defendant declined, and sold the potatoes. The Court of Common Pleas held that the property had passed to the plaintiffs; but was reversed in the Court of Appeal, by Cairns, L. C., Kelly, C. B., Bramwell, B., and Blackburn, J. Cairns, L. C., delivering the judgment of the Court, said, "Where the shipper takes and keeps in his or his "agent's hands a bill of lading in this form to protect himself, this "is effectual so far as to preserve to him a hold over the goods until "the bill of lading is handed over on the conditions being fulfilled, "or at least until the consignee is ready and willing and offers to "fulfil these conditions, and demands the bill of lading. And we "think that such a hold retained under the bill of lading is not "merely a right to retain possession till those condititions are ful-"filled, but involved in it a power to dispose of the goods on the "vendee's default, so long at least as the vendee continues in de-"fault. It is not necessary in this case to consider what would be "the effect of an offer by the plaintiffs to accept the draft and pay "the money before the sale, for no such offer in this case was ever "made."

Gabarron v. *Kreeft* (*u*), in 1875, the defendants had contracted to purchase from Munoz all the ore to be obtained from a certain mine within twelve months. Various vessels had been loaded by Munoz, and at the time when the *"Trowbridge" arrived to [*163] take on board her cargo, payments had been made in advance, so that Munoz would not have been entitled to any further payment in respect of her cargo. Munoz had ore in stock which he ought to have shipped, taking bills of lading to the defendant's order. But instead of doing this he picked a quarrel with them, and telegraphed to the defendants that he would not load the "Trowbridge" on their account. He then loaded her and took bills of lading making the shipment appear to be by one Sabadie, and making the cargo deliverable to Sabadie's order. Sabadie was a mere sham. The bill of lading was indorsed, and pledged with the plaintiff. The Court held that the property had not passed to the defendants.

In the case of *The South Australian Insurance Company* v. *Randell* (*x*), in 1869, where the course of business was for farmers to bring their corn to the respondent's mill where in the farmers' presence it was shot into large hutches, where it became mixed

(*u*) *Gabarron* v. *Kreeft*, L. R. 10 Ex. 274; 44 L. J. Ex. 238.
(*x*) *The South Australian Insurance Co.* v. *Randell*, L. R. 3 P. C. C. 101.

with corn brought by other farmers. The respondents gave a receipt for it, "Received, &c., to store," and could do what they liked with it. The farmer could at any time demand back an equal quantity of like quality, or the market price on the day of demand.

The Privy Council held that the property passed to the millers, and approved of the law as stated by Sir W. Jones in his treatise on bailments, that wherever there is a delivery of property on a contract for an equivalent in money or some other valuable commodity, and not for the return of his identical subject-matter in its original or an altered form, this is a transfer of property for value—it is a sale, not a bailment.

In some cases the property may pass by action at law. Thus in *Cooper* v. *Shepherd* (*y*) the plaintiff sued Willomat in trover for the value of a bedstead and recovered, Willomat sold it to defendant. Held, that the defendant had a good title.

The two following cases show that where the intention to [*164] *pass the property existed, the property passes notwithstanding that that intention was induced by a fraud. As Pollock, C. B., said, in delivering the judgment of the Exchequer Court in *Kingsford* v. *Merry* (*z*), in 1856, "When a vendee obtains possession of a chattel with the intention by the vendor to transfer both the property and possession, although the vendee has committed a false and fraudulent misrepresentation in order to effect the contract or obtain the possession, the property vests in the vendee until the vendor has done some act to disaffirm the transaction; and the legal consequence is, that if before the disaffirmance the fraudulent vendee has transferred either the whole or a partial interest in the chattel to an innocent transferee, the title of such transferee is good against the vendor."

In *Attenborough* v. *St. Katharine's Dock Co.* (*a*), in 1878, Lopez, who was a wine grower at Cadiz, consigned wine to Dolaro in London, and sent the bills of lading to his agent, Speller. Speller was induced by fraud to sell the wine, and handed the bills of lading to Dolaro. The wine was entered by Dolaro at the Custom House, and placed by the defendants in their bonded vaults. The defendants issued warrants making the wine deliverable to Dolaro or assigns, and Dolaro pledged them with the plaintiffs. Subsequently Lopez gave notice to the defendants not to part with the wine on the ground that it had been obtained from him by fraud. The Court held that there was a complete contract of sale passing the property in the wine to Dolaro, although it had been induced by fraud: and that although upon discovering the fraud Lopez might

(*y*) *Cooper* v. *Shepherd*, 3 C. B. 266; 15 L. J. C. P. 237; *Buckland* v. *Johnson*, 15 C. B. 145; 23 L. J. C. P. 204; overruled in *Brinsmead* v. *Harrison*, 6 C. P. 584; 40 L. J. C. P. 281.

(*z*) *Kingsford* v. *Merry*, 11 Ex. 579; 1 H. & N. 503; 25 L. J. Ex. 166; 26 L. J. Ex. 83.

(*a*) *Attenborough* v. *St. Katharine's Dock Co.*, L. R. 3 C. P. D. 373 and 450; 47 L. J. C. P. 763.

have disavowed the contract, yet before he did so the plaintiffs had obtained a good equitable title to the goods.

In *Babcock* v. *Lawson* (*b*), in 1880, the plaintiffs had lent *Denis Daly and Sons their acceptances for a large sum of [*165] money, on the security of certain flour which Denis Daly and Sons warehoused in the plaintiffs' name. Daly and Sons then applied to the defendants for an advance on the security of the same flour, but without letting them know of their agreement with the plaintiffs. The defendants in good faith agreed to make the advance if the flour was warehoused in their name with absolute possession and power to sell. In order to carry out this fraudulent scheme Daly and Sons represented to the plaintiffs that they had sold the flour to the defendants, who would pay for it on delivery, and would pay the proceeds of the sale to them when received. Thereupon the plaintiffs gave Daly and Sons a delivery order, and directed the warehouseman to transfer the room in which the flour was deposited to Lawson and Co., and this was accordingly done. It was held in the Queen's Bench, and affirmed in the Court of Appeal, that the plaintiffs had passed the special property in the goods, which they had as pledgees, to the pledgors Daly and Sons, and could not recover (*c*).

It may be well here to advert to the distinction between those cases where there was in fact a contract of sale, and those cases where there was an intention to contract, but no contract was in fact entered into, either in consequence of a misunderstanding as to the thing sold, or as to the person with whom the contract is made.

An early case of this class is the one to be found in Pothier's work on the Law of Sales, as being related by Plutarch in his "Life of Solon": "Some Milesians, being at the island of Chios, "purchased of some fishermen there, the casting of their net. The "fishermen drew up a golden tripod, and the buyers laid claim to "it. In this case the claim was not well founded, for they did not "intend to buy, nor did the sellers intend to sell, anything except "the fish which might be taken."

*In *Thornton* v. *Kempster* (*d*), in 1814, the plaintiff [*166] wished to sell Petersburg clean hemp, and the defendant to buy Riga Rhine hemp, it was held there was no contract. And in *Phillips* v. *Bistolli* (*e*), in 1824, the defendant made a bid at an auction and had the goods knocked down to him. They were handed to him, but on finding he had made a mistake as to the price, immediately returned them, it was held to be a question of fact whether there had been such an acceptance as to make the contract good. In the case of *Raffles* v. *Wichelhaus* (*f*), in 1864,

(*b*) *Babcock* v. *Lawson*, 4 Q. B. D. 394; 48 L. J. Q. B. 524; 5 Q. B. D. 284; 49 L. J. Q. B. 408.

(*c*) See also *Parker* v. *Patrick*, in 1793, 5 T. R. 175.

(*d*) *Thornton* v. *Kempster*, 5 Taunt. 786, *ante*, p. 94.

(*e*) *Phillips* v. *Bistolli*, 2 B. & C. 511.

(*f*) *Raffles* v. *Wichelhaus*, 2 H. & C. 906; 33 L. J. Ex. 160.

the contract was again a broker's, in which the vendor sold cotton "to arrive *ex Peerless* from Bombay," which ship sailed from Bombay in December. The defendant admitted that he intended to buy cotton *ex* a ship called *Peerless*, but it was a different ship which sailed in October. Held no contract.

In *Smith* v. *Hughes* (*g*), in 1871, the defendant refused to accept and pay the plaintiff for oats, saying that he had intended to purchase old oats, and new ones had been tendered. There was a difference as to what had been said at the time of the sale as to the age. One question left to the jury was whether at the time of contracting, the plaintiff had believed the defendant to be under the impression he was buying old oats. But in the motion for a new trial the majority of the Court was of opinion that the point whether there was a contract or not depended not on the self-deception of the buyer, but on whether the defendant bought them under the belief that they were warranted old.

Cockburn, C. J., said, "Suppose a person to buy a horse without "a warranty, believing him to be sound, could it be contended that "it would be open to him to say that, as he had intended to buy a "sound horse, and the seller to sell an unsound one, the contract "was void, because the seller must have known from the price "the buyer was willing to give, or from his general habits as a [*167] "buyer of horses, that he *thought the horse was sound?" And Blackburn, J., said, "I agree that even if the vendor was "aware that the purchaser thought that the article possessed that "quality" (age), "and would not have entered into the contract "unless he had so thought, still the purchaser is bound, unless the "vendor was guilty of some fraud or deceit upon him, and that a "mere abstinence from disabusing the purchaser of that impression "is not fraud or deceit; for, whatever may be the case in a court "of morals, there is no legal obligation on the vendor to inform the "purchaser that he is under a mistake, not induced by the act of the "vendor" * * * * "But I doubt whether the direction" (of the County Court judge) "would bring to the minds of the "jury the distinction between agreeing to take the oats under the "belief that they were old, and agreeing to take the oats under the "belief that the plaintiff contracted that they were old. The differ-"ence is the same as that between buying a horse believed to be "sound, and buying one believed to be warranted sound."

In *Hardman* v. *Booth* (*h*), 1863, one of the plaintiffs, who were worsted manufacturers, called with Keighly, the London agent of his firm, at the offices in Upper Thames Street, of Gandell and Co., whom they knew as an old established firm, but by reputation only. Thomas Gandell was the only partner in it, but he was unwell, and they interviewed Edward Gandell, a son of Thomas, who managed the business. The goods in question were ordered by Edward

(*g*) *Smith* v. *Hughes*, L. R. 6 Q. B. 597; 40 L. J. Q. B. 221.
(*h*) *Hardman* v. *Booth*, 1 H. & C. 803; 32 L. J. Ex. 105.

Gandell. The first lot was sent to Upper Thames Street, and the second lot was taken away in a cart belonging to Gandell and Co. The plaintiff drew on Thomas Gandell and Co., but at the request of Edward Gandell, the name was altered to Edward. The invoices were headed "Edward Gandell and Co., Upper Thames Street."

The goods were pledged by Edward Gandell with the defendant. Edward Gandell became bankrupt. The Court held the plaintiffs had intended to contract *with Gandell and Co., and not [*168] with Edward Gandell, to whom there had been no intention to pass the property (*i*).

In the case of *Hollins* v. *Fowler* (*k*), in 1874, the point decided was whether there had been a conversion or not under these circumstances: Bayley, a cotton broker, represented that he was purchasing cotton for Seddon, and Fowlers believing they were selling to Seddon, delivered to Bayley as Seddon's broker, thirteen bales of cotton. Bayley then sold and delivered the cotton to Hollins, who resold and delivered it to Micholls. It does not seem to have been argued that the property had passed from Fowlers, and Blackburn, J., said (*l*), that both the property and the right to the possession remained in them.

In *Cundy* v. *Lindsay* (*m*), decided in the house of Lords in 1878, Lindsay and Co. were linen manufacturers at Belfast. A man named Blenkarn, who had hired a room at 37, Wood Street, London, wrote to them about purchasing some goods of their make, and signed his name in such a way as to appear like Blenkiron and Co. There was a highly respectable firm by the name of W. Blenkiron and Son, who carried on business at 123, Wood Street, London. Lindsay and Co. who knew this firm by name, and believed themselves to be dealing with them, set the goods and invoices addressed to Messrs. Blenkiron and Co., 37, Wood Street, Cheapside, where they were received by Blenkarn. Blenkarn then sold the goods thus fraudulently obtained to Messrs. Cundy, who were *bonâ fide* purchasers, and who resold them in the course of their trade. Blenkarn was convicted and sentenced, and this action was brought by Lindsay for the unlawful conversion. Cairns, L. C., delivering judgment, said (*n*): "With regard to the *title to personal [*169] "property, the settled and well known rules of law may, I take "it, be thus expressed: by the law of our country the purchaser of "a chattel takes the chattel as a general rule, subject to what may

(*i*) See also *In re Reed, Ex parte Barnett*, in 1876, 3 Ch. D. 123; 45 L. J. Bank. 120.

(*k*) *Hollins* v. *Fowler*, L. R. 7 Q. B. 616; 7 E. & I. App. 757; 41 L. J. Q. B. 277; 44 L. J. Q. B. 169.

(*l*) 7 E. & I. Ap. 763; 44 L. J. Q. B. 172.

(*m*) *Cundy* v. *Lindsay*, 1 Q. B. D. 348; 2 Q. B. D. 96; 3 Ap. Ca. 459; 45 L. J. Q. B. 381; 46 L. J. Q. B. 233; 47 L. J. Q. B. 481. See also *Mitchell* v. *Lepage*, in 1816, Holt, N. P. 253; *Boulton* v. *Jones*, 2 H. & N. 564; 27 L. J. Ex. 117; *Loeschman* v. *Machin*, in 1818, 2 Stark N. P. C. 311.

(*n*) 3 Ap. Ca. 463; 47 L. J. 483.

"turn out to be certain infirmities in the title. If he purchases "the chattel in market overt, he obtains a title which is good "against all the world, but if he does not purchase the chattel in "market overt, and if it turns out that the chattel has been found "by the person who professed to sell it, the purchaser will not "obtain a title good as against the real owner. If it turns out that the "chattel has been stolen by the person who has professed to sell it, "the purchaser will not obtain a title. If it turns out that the "chattel has come into the hands of the person who professed to "sell it, by a de facto contract, that is to say, a contract which has "purported to pass the property to him from the owner of the "property, there the purchaser will obtain a good title, even al-"though afterwards it should appear that there were circumstances "connected with that contract which would enable the original owner "of the goods to reduce it and set it aside, because these circum-"stances so enabling the original owner of the goods, or of the "chattel, to reduce the contract and set it aside will not be allowed "to interfere with a title for valuable consideration obtained by some "third party during the interval while the contract remained unre-duced." The House held that there had been no intention on the part Lindsay and Co. to pass the property to Blenkarn, and therefore of Messrs. Cundy had no title to the goods (*o*).

With this case may be contrasted those cases where an agent "entrusted" gave a good title by virtue of the Factors Acts (*p*). [*170] *To the general rule that a person cannot give a better title than he has, there are a few exceptions.

A person having a gold coin or bank note in his possession, to which he has no title whatever, may give a good title to it to a stranger. The law on these exceptions will be found in the notes to *Miller* v. *Race* (*q*).

And a person purchasing in market overt gets a good title until the conviction of the thief. The law on this subject is continued in Chitty on Contracts and in Benjamin on Sales (*r*).]

(*o*) See also *Higgons* v. *Burton*, in 1857, 26 L. J. Ex. 342; and *Cooper* v. *Willomatt*, in 1845, 1 C. B. 672; 14 L. J. C. P. 219.

(*p*) *Baines* v. *Swainson*, 4 B. & S. 270; 32 L. J. Q. B. 281; *Heyman* v. *Flewker*, 13 C. B. N. S. 519; 32 L. J. C. P. 132; *Cole* v. *N. W. Bank*, L. R. 9 C. P. 470; L. R. 10 C. P. 354; 43 L. J. C. P. 194; 44 L. J. C. P. 233; *Vickers* v. *Hertz*, L. R. 2 Sc. Ap. 113; *Johnson* v. *Credit Lyonaise*, L. R. 2 C. P. D. 224; L. R. 3 C. P. D. 32; 44 L. J. C. P. 241. See *post*, p. 426.

(*q*) *Miller* v. *Race*, 1 Sm. L. Ca. 475.

(*r*) See also *Walker* v. *Matthews*, 8 Q. B. D. 109; 51 L. J. Q. B. 243.

*CHAPTER II. [*171]

CONDITIONS PRECEDENT TO THE PASSING OF THE PROPERTY, IMPLIED BY LAW.

When the parties are agreed as to the goods on which the agreement is to attach, the presumption is, that the parties intend the right of property to be transferred at once, unless there be something to indicate a contrary intention. An agreement, therefore, concerning the sale of specific or ascertained goods, is *primâ facie* a bargain and sale of those goods. But this arises merely from the presumed intention of the parties, and if it appear that the parties have agreed, not that there shall be a mutual credit by which the property is to pass from the vendor to the purchaser and the purchaser is to be bound to the vendor for the price, but that the exchange of the money for the goods shall be made on the spot, no property is transferred, for it is not the intention of the parties to transfer any. In other words, a contract for the sale of specific chattels, is *primâ facie* a contract to transfer the property, in consideration of the purchaser becoming bound to pay the price; but if the parties choose so to agree, it may be a contract to transfer the property, in consideration of the purchaser actually paying the price, and not merely of his engagement so to do.

In the earlier English law books, it seems to be assumed that all agreements are of this ready money character unless there is something to indicate a contrary intention. Thus in *Noy's Maxims* (*a*), it is said, "In all agreements there must be *quoid pro quo* presently, "except a day be expressly given for the payment, or else it is no-"thing but communication. * * * If the bargain be that you shall "give me 10*l.* for *my horse, and you gave me one penny [*172] "in earnest, which I accept, this is a perfect bargain, you shall "have the horse by an action on the case, and I shall have the "money by an action of debt. If I say the price of a cow is 4*l.*, "and you say you will give me 4*l.*, and do not pay me presently, "you cannot have her afterwards without I will, for it is no con-"tract; but if you begin directly to tell your money, if I sell her to "another, you shall have your action on the case against me. * * "If I sell my horse for money, I may keep him until I am "paid, but I cannot have an action of debt until he be delivered, "yet the property of the horse is, by the bargain, in the bargainee "or buyer; but if he presently tender me my money, and I refuse "it, he may take the horse, or have an action of detinue; and if

(*a*) *Noy's Maxims*, pp. 87, 88, 89.

"the horse die in my stables, between the bargain and delivery, I "may have an action of debt for the money, because by the bargain "the property was in the buyer."

The part payment, or naming a day for payment, clearly indicates an intention in the parties that they should have some time to complete the sale by payment and delivery, and that they should in the meantime be trustees to each other, the one of the property in the chattel, the other of the price; and Noy was of opinion that the law, in such a case, executed their intention, and transferred the property at once subject to the vendor's rights. In the case which he puts of the cow, there was nothing to indicate such an intention to give time, and he seems to think that it was to be presumed, that such an intention did not exist. This presumption was, probably, reasonable and just in the simplicity of early times, but with the change of customs the presumption also has changed, and in modern times (at least in commercial transactions), the parties are taken to contemplate an immediate transfer of the property in the goods, and an immediate obligation to pay the price, with a reasonable time for delivery and payment, unless there be something to show a different intention. "Generally speaking," said Bayley, J. in *Simmons* v. *Swift* (*b*), "where a bargain is made for the purchase [*173] "of *goods, and nothing is said about payment or delivery, "the property passes immediately, so as to cast upon the purchaser "all future risk, if nothing remains to be done to the goods, al- "though he cannot take them away without paying the price." But where the presumption is rebutted, either from the nature of the transaction, or from other circumstances that show that the transaction is an exchange for ready money, the modern law does not differ from the ancient. Thus in the case of *Bussey* v. *Barnett* (*c*), in 1842, the Exchequer held, that where goods were sold and delivered in a retail shop, the nature of the transaction showed, that the goods and money were to be exchanged simultaneously, and, consequently, that proof that the money had then been paid, amounted in legal effect to proof that the purchaser never was indebted to the seller, and not, that having been indebted, he had paid the debt.

In *Bishop* v. *Shilitto* (*d*), in 1819, the plaintiff brought an action of trover for some iron which had been delivered by him to the defendant under a contract, by which the defendant was to take certain bills out of circulation, which had not been done. The defendant's counsel objected, that the property had been transferred, and that the proper remedy was by an action on the contract. Chief Justice Abbott, however, left it to the jury to say, whether it was part of the agreement that the delivery of the iron and the re-delivery of the bills, were to be contemporaneous; and the jury hav-

(*b*) *Simmons* v. *Swift*, 5 B. & C. 862.
(*c*) *Bussey* v. *Barnett*, 9 M. & W. 312.
(*d*) *Bishop* v. *Shilitto*, 2 B. & A. 329, n.

ing found that it was, the Chief Justice, and afterwards the full Court, held the plaintiff entitled to recover.

However, except under particular circumstances, the parties to an agreement concerning the sale of specified chattels are taken to intend an immediate transfer of the right of property from the vendor to the purchaser, and the law fulfils their intention, and transfers the right of property accordingly. But there is nothing to prevent the parties from coming to an agreement that the property shall be transferred when *and not till certain conditions have been [*174] performed; when the agreement is of that nature, the law fulfils the intention of the parties. The property is not transferred before the performance of the conditions; if nothing has occurred in the meantime to prevent it, the property is transferred as soon as the conditions are performed.

Where, therefore, the agreement is for the sale of goods, and also for the performance of other things, it becomes important to ascertain whether the performance of any of those things is meant to precede the vesting of the property or not. This is a question of the construction of the agreement, and it may often happen that the parties have expressed their intention in a manner that leaves no room for doubt (*e*); when, however, they have not done so in express terms, the intention must be collected from the whole agreement, and the Courts have since the beginning of this century adopted for this purpose some rules of construction which are, perhaps, some of them a little artificial. These rules, of which there is no trace in the Reports before the time of Lord Ellenborough, are laid down since the time of that learned judge as rules of English law, in terms nearly equivalent to those in which they are laid down as rules of civil law.

They are twofold: the first is that where, by the agreement, the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is to be bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall (in the absence of circumstances indicating a contrary intention) be taken to be a condition precedent to the vesting of the property.

The second is, that where anything remains to be done to the goods for the purpose of ascertaining the price as by weighing, measuring, or testing the goods where the price is to depend on the quantity or quality of the goods; the performance of those things, also, shall be a condition precedent to the transfer of the property, although the individual goods *be ascertained, [*175] and they are in the state in which they ought to be accepted.

The first of these rules seems to be founded in reason. In general, it is for the benefit of the vendor that the property should pass; the risk of loss is thereby transferred to the purchaser, and

(*e*) See *post*, p. 196.

as the vendor may still retain possession of the goods, so as to retain a security for payment of the price, the transference of the property is to the vendor pure gain. It is, therefore, reasonable, that where by the agreement the vendor is to do something before he can call upon the purchaser to accept the goods as corresponding to the agreement, the intention of the parties should be taken to be, that the vendor was to do this before he obtained the benefit of the transfer of the property. The presumption does not arise, if the things might be done after the vendor had put the goods in the state in which he had a right to call upon the purchaser to accept them, and would be unreasonable where the acts were to be done by the buyer, who would thus be rewarded for his own default.

The second rule seems to be somewhat hastily adopted from the civil law, without adverting to the great distinction made by the civilians between a sale for a certain price in money, and an exchange for anything else. The English law makes no such distinction, but, as it seems, has adopted the rule of civil law, which seems to have no foundation except in that distinction (*f*). In general, the weighing, &c., must, from the nature of things be intended to be done before the buyer takes possession of the goods, but that is quite a different thing from intending it to be done before the vesting of the property; and as it must in general be intended that both the parties shall concur in the act of weighing, when the price is to depend upon the weight, there seems little reason why, in cases in which the specific goods are agreed upon, it should be supposed to be the intention of the parties to render the delay of that act, in which the buyer is to concur, beneficial to him. Whilst the price [*176] remains unascertained, *the sale is clearly not for a certain sum of money, and therefore does not come within the civilian's definition of a perfect sale, transferring the risk and gain of the thing sold; but the English law does not require that the consideration for a bargain and sale should be in moneys numbered, provided it be of value.

Still both the rules seem to be now firmly established as English law, though, as has been already stated, only [since the beginning of this] century, and then, it seems, adopted directly from the civil law. The reader will find some extracts from Pothier in a subsequent part of this work, and by comparing them with the language of the Judges in the cases, he will judge of the accuracy of this opinion. The rules now rest upon the authority of the English decided cases, and cannot be questioned on the ground of their recent introduction into English law.

The first case reported in which these rules are alluded to as rules of English law, is that of *Hanson* v. *Meyer* (*g*), as recently as the year 1805. The facts of that case were, that Meyer having

(*f*) See *post*, p. 242, for further remarks on this point, and page 252.
(*g*) *Hanson* v. *Meyer*, 6 East, 614.

sold the whole of a parcel of starch in a warehouse at 6*l.* per cwt. directed the warehousemen to weigh and deliver the starch. Part of the starch was weighed and delivered, but before they had weighed the rest the purchasers failed, and Meyer, who was unpaid, countermanded the order to the warehousemen and took away the unweighed starch, and the assignees of the bankrupt purchasers brought an action of trover against him for so doing. The Court of King's Bench decided in favour of the defendant. The judgment of the Court was delivered by Lord Ellenborough, who observed, that by the terms of the particular contract, the price was made to depend upon the weight. "The weight, therefore, must "be ascertained, in order that the price may be known and paid, "and unless the weighing precede the delivery, it can never for "those purposes effectually take place at all." The judgment was carefully worded, so as to decide no more than that this made the *weighing a condition precedent to the purchaser's right to [*177] take possession, or as Lord Ellenborough worded it, their "*complete present* right of property;" but though not deciding anything as to the vesting of the general property in the purchasers, it was an indication of the opinion of the Court of King's Bench.

The next case was *Hinde* v. *Whitehouse* (*h*), in 1807, a year later and in the same Court. There sugar lying in a bonded warehouse was sold by auction, on conditions of which the material part, as far as regards this point, was as follows: "The highest bidder to be the purchaser; to be at the purchaser's risk from the time of sale * *. The duties are not yet paid, but we intend paying them to-morrow morning." The next morning was a holiday at the custom-house, and therefore the duties could not be paid, and before the custom-house opened again, the sugar was consumed by an accidental fire. The question in the cause was stated by Lord Ellenborough to be, "whether enough had taken place to change "the property, and make them the goods of the purchaser;" and it was decided that the sale was complete "within the meaning of the parties to the conditions." "The words '*time of sale*,' and '*highest bidder to be purchaser*,'" said Lord Ellenborough, "all evidently "relate to the transaction of selling at the time and place of auction, which was considered between them as effectual for the purpose of transferring the property, and the consequent risk of loss "from the buyer to the seller, notwithstanding the intermediate "right of custody or lien upon the goods in the crown, until the "duty should be paid." This case, therefore, decided that the property passed, because such was the intention of the parties appearing by the agreement in that particular case.

The rules were first applied as the ground on which the judgment of the Court turned in *Rugg* v. *Minett* (*i*), in 1809. There

(*h*) *Hinde* v. *Whitehouse*, 7 East, 558.
(*i*) *Rugg* v. *Minett*, 11 East, 210.

[*178] Rugg bought 24 lots of turpentine out of 27, *which were sold by auction. By the terms of the sale, 25 out of the 27 lots were to be filled up by the sellers from the other two, and so made to contain each a specified quantity, and the two last lots were then to be measured and paid for according to their contents; Rugg's purchase included these two lots of uncertain quantities. The three lots which were not purchased by Rugg were filled up and removed, so that Rugg was clearly entitled to have the whole of what remained, and no difficulty could arise from the subject-matter of the sale not being ascertained. Rugg paid about 2000*l.* on account of the turpentine; the greater part of the lots were filled up, and the others were being filled up, when, by an accidental fire, the whole was consumed, no part having been delivered. Rugg brought an action in the King's Bench to recover the 2000*l.* he had paid on account, and the Court held that all those lots which were filled up before their destruction were the property of the purchaser; and that the sellers were entitled to retain their price, but that the others remained the property of the seller, who must therefore refund the price received on account of them. The test according to Lord Ellenborough, was whether "everything had been "done by the sellers which lay upon them to perform in order to "put the goods in a deliverable state." And Bayley, J., said that "if the sellers meant to relieve themselves from all further respons-"ibility they should have done what remained for them to do, "until that was done the property remained in them" (*k*).

This decision was soon followed by a variety of cases in which the principle was recognised (*l*), though in most of them it was not necessary for the decision of the case then before the Court, as in [*179] some the goods were not specified, *and in others the question was whether there was an actual delivery of the possession, as well as a change in the property; but in one or two cases the decision was on the very point.

In *Zagury* v. *Furnell* (*m*), in July, 1809, about two months after *Rugg* v. *Minett* (*n*), where the contract was for the sale of 289 bales of goatskins, containing five dozen in each bale, at the rate of 1*l.* 17*s.* 6*d.* per dozen; and it was proved that the custom of trade was for the seller to count the bales before delivery, and that these bales were all consumed by fire before they were counted. Lord Ellenborough, at Nisi Prius, decided, "that as the enumeration of

(*k*) [The Judges who decided this case appear from the report to have treated it rather as one governed by an inflexible rule of law, than as one to be governed by that rule only where the parties themselves have not indicated their intention; and probably this case and *Simmons* v. *Swift*, 5 B. & C. 857, next page, would be explained if the point arose again; see the judgments in *Martineau* v. *Kitching*, L. R. 7 Q. B. 450 and 454; 41 L. J. Q. B. 227.]

(*l*) *Wallace* v. *Breeds*, 13 East, 522; *Busk* v. *Davis*, 2 M. & S. 396; *Withers* v. *Lys*, 4 Camp. 237.

(*m*) *Zagury* v. *Furnell*, 2 Camp. 240.

(*n*) *Rugg* v. *Minett*, 11 East, 210.

"the skins was necessary to ascertain the price, this was an act "for the benefit of the seller, and as the act remained to be done "when the fire happened, there was not a complete transfer to the "purchaser, and the skins continued at the seller's risk."

And in *Simmons* v. *Swift* (*o*), which was decided by the King's Bench, in 1826, after Lord Ellenborough's death, the Court held that where a particular specified stack of bark was sold at 9*l.* per ton, the property did not pass until it was weighed, for from the nature of the contract it was a necessary part of it that it should be weighed, and the concurrence of the seller in the act of weighing was necessary. Bayley, J., said that "generally speaking, where a "bargain is made for the purchase of goods and nothing is said "about payment or delivery, the property passes immediately, so as "to cast upon the purchaser all future risks if nothing further "remains to be done to the goods, although he cannot take them "away without paying the price. If anything remains to be "done on the part of the seller, until that is done the property is "not changed (*p*)."

[In *Logan* v. *Le Mesurier* (*q*), in 1847, in the Privy Council, the sale was of a raft of red pine timber, lying at *the date of the [*180] sale up the river, to be delivered at Quebec, consisting of 50,000 feet more or less, to be paid for at 9½*d.* a foot. The raft was floated to Quebec, where the greater portion of the timber was lost in a storm. The Court held that the property had not passed, and that the money paid could be recoverd back. After the storm the purchasers collected some of the timber, dressed and shipped it on their own account, but the Court held that this could not be taken as an admission that the property had passed, when the contract showed that it did not so pass (*r*).

In *Acraman* v. *Morrice* (*s*), in 1849, the plaintiffs were the assignees in bankruptcy of Swift the vendor, a timber merchant; the defendant was a timber merchant in London.

The course of dealing between Swift and the defendant had been for the defendant to inspect the felled trees belonging to Swift and to measure and mark such portions as suited him. Swift then cut off the rejected portions and carried the rest at his own cost to Chepstow, where he delivered it to the defendant. At the time of Swift's bankruptcy the timber, the subject of this action, had been marked, measured, and paid for by the defendant; but the rejected portions had not been cut off. The timber was then lying in the Forest of Monmouth, and the defendant, who had probably heard of Swift's bankruptcy, himself cut off those parts and carried the rest away. The Court held that the property had not passed.

(*o*) *Simmons* v. *Swift*, 5 B. & C. 857.

(*p*) The note to *Rugg* v. *Minett*, 11 East, 210, on the preceding page, seems to be applicable to this case also.

(*q*) *Logan* v. *Le Mesurier*, 6 Moo. P. C. 116; 11 Jur. 1091.

(*r*) See also *Boswell* v. *Kilborn*, 15 Moo. P. C. C. 309; 8 Jur. N. S. 433.

(*s*) *Acraman* v. *Morrice*, 8 C. B. 449; 19 L. J. C. P. 57.

In this and the preceding case, the action of the purchasers long after the contract would hardly be evidence of what was the intention of the parties at the date of the contract.

In *Turley* v. *Bates* (*t*), in 1863, the contract as found by the jury was for the sale of an entire heap of fire-clay at 2*s.* a ton, the buyer to take it away at his own expense, in his own carts, and to have it weighed at a certain machine.

On three or four occasions the defendant had carted away portions [*181] of the heap and had had them weighed, but on the *last occasion he carted away a portion of the heap, and put it into a barge, and the plaintiff observing what was going on, followed, and by agreement the amount in the barge was taken at 22 tons. The judgment of the Court, consisting of Pollock, C. B., Bramwell and Channell, B. B., was delivered by Channell, B., who, after referring to the cases on this subject, and to the rule that the property does not pass where anything remains to be done to the goods for the purpose of ascertaining the price, said, "From a con-"sideration of these cases, it appears that the principle involved in "the rule above quoted is, that something remains to be done by the "*seller*. It is, therefore, very doubtful whether the present case "comes within the principle of the rule. But, however that may "be, it is clear that this rule does not apply if the parties have "made it sufficiently clear whether or not they intend that the "property shall pass at once, and that their intention must be "looked at in every case." The Court held that in this case, that intention had been expressed, and that the property had passed.

In *Kershaw* v. *Ogden* (*u*), in 1865, the facts were that the defendant had contracted to purchase 4 specified stacks of cotton waste at 1*s.* 9*d.* a pound, and to send his own packer and sacks and carts to remove them. The defendant sent his packer with 81 sacks, into which the 4 stacks were put. Two days afterwards 21 of the sacks were weighed and taken to the defendant's warehouse, and returned to the plaintiff the same day as not being of the desired quality. The sale was not a sale by sample. The other sacks were not weighed, but the Court, consisting of Pollock, C. B., Martin and Bramwell, BB., held that the property in all the 81 sacks had passed. Pollock, C. B., considered the case the same as *Turley* v. *Bates* (*x*). Martin, B., said, "The question depends upon what "was the contract, and the jury have found that it was a contract "to buy four stacks of cotton waste specifically agreed upon, more "or less, taking them for better or worse. If that finding is [*182] *"correct, of which I entertain no doubt, the result is that "the property in the four stacks passed to the defendants."

In the case of *Young* v. *Matthews* (*y*), in 1866, Moxon, a brick-

(*t*) *Turley* v. *Bates*, 2 H. & C. 200; 33 L. J. Ex. 43.
(*u*) *Kershaw* v. *Ogden*, 34 L. J. Ex. 159; 3 H. & C. 717.
(*x*) *Turley* v. *Bates*, 2 H. & C. 200; 33 L. J. Ex. 43.
(*y*) *Young* v. *Matthews*, L. R. 2 C. P. 127; 36 L. J. C. P. 61.

maker, was indebted to Northern, and applied to him for a further advance, which Northern made in consideration of Moxon selling him 1,300,000 bricks at 26*s.* per 1000. Northern then sent Lucas to the brickfield with a delivery order for the bricks signed by Moxon; Moxon's manager told Lucas that he might have them as soon as a man who was in possession under the landlord's distress for £300, was paid. The manager pointed out three clumps of bricks, one of which was finished, and which he said should be taken first; another, still burning, which would be ready when the first had been taken; and a third, which was being formed of moulded bricks preparatory to burning, and stated that he would hold and deliver them to Northern's order. The £300 was not paid. Moxon became bankrupt, and the landlord then sold enough bricks to pay himself, and Northern sold the remainder to the defendant, who carried them away. The creditors' assignee brought trover. The Court, consisting of Erle, C. J., Willes, Byles, and Keating, JJ., held that the property had passed to Northern.

The judgment of the Court turned on the expressed intention of the parties. Erle, C. J., said, "There is no doubt that the parties "could pass the property in all the bricks, whether finished or not, "if such was their intention; and what passed amounted to this: "Northern's agent said, 'Are all these appropriated to my princi-"'pal?' and the seller's agent said 'Yes.'"

In *Martineau* v. *Kitching* (*z*), in 1872, the plaintiffs, who were sugar refiners, carried on business as follows: They refined the sugar, ran it into moulds holding from 38 to 42 lbs., forming sugar-loaves; they marked each sugar-loaf, called a titler, with a distinctive number, and placed the titlers in their warehouse. The titlers *were sold at so much per cwt., but were not weighed until [*183] they were delivered out of the warehouse to the purchaser.

The defendant purchased a number of titlers marked as above, at so much per cwt., the contract being that they were to be paid for at one month, and to remain "at seller's risk for two months." He paid the price as calculated approximately, and resold certain of the titlers, which were given up to the sub-purchasers on the production of the defendant's orders of delivery, and weighed on delivery. The remainder were consumed in a fire after the expiration of two months, and before they had been weighed. The defendant refused to pay for them on the ground that the property had not passed, and that he was not bound to pay for them until it had passed; it was agreed that the payment he had made should be considered as made to another account.

It seems tolerably clear from the judgments, that if it had been necessary to decide whether the property had passed or not, the Court would have held that it had passed, but the case was decided on the words of the contract, "at seller's risk for two months," which showed that after two months they were to be at the buyer's risk

(*z*) *Martineau* v. *Kitching*, L. R. 7 Q. B. 436; 41 L. J. Q. B. 227.

no matter where the property was. As Blackburn, J., said (*a*), "If you show that the risk attached to the one person or the other, "it is a very strong argument for showing that the property was "meant to be in him. But the two are not inseparable. It may "be very well that the property shall be in the one and the risk in "the other."]

The rule is further illustrated by a class of cases in which it has been decided that where the agreement is that one party shall make and deliver some chattel, no property passes before the chattel is complete and in a deliverable state, unless there be something peculiar in the agreement. In several of these cases the decision of the Court, that no property passed seems to have been given because the individual chattel had not been ascertained.

If it appear from the agreement that the intention of the [*184] *parties is that the property shall pass presently, the property does pass, though there remain acts to be done by the vendor before the goods are deliverable. It is to be observed that whilst the vendor is unpaid it is exclusively for his interest that the property should pass as he gets rid of the risk; but when he is partially or entirely paid it may be for the benefit of the purchaser, for in the event of a paid vendor becoming insolvent the purchaser, if the property has passed, has the goods as a security for his money, but if it has not passed he can but at best recover such a proportion of the price paid as the estate of the insolvent can furnish. If, therefore, it appears by the agreement that the parties intended the price to be paid before the goods were put in a deliverable state, it affords an argument that the parties intended the property also to pass before the goods were in a deliverable state; and if the whole agreement show that such was the intention, the property does pass.

[In *Mucklow* v. *Mangles* (*b*), in 1808, Royland, who was a barge builder, contracted with Pocock to build him a barge. Pocock advanced him money on account from time to time to the full value of the barge, and when it was nearly finished Pocock's name was painted on the stern, but the report does not say by whose orders. Two days after it was finished it was seized under an execution. The court held that the property had not passed to Pocock. Heath, J., said, "A tradesman often finishes goods which he is making in "pursuance of an order given by one person, and sells them to "another; if the first customer has other goods made for him within "the stipulated time, he has no right to complain; he could not bring "trover against the purchaser for the goods so sold."

The authority of this case has been considerably weakened by later decisions, and Best, C. J., and Park, J., in *Carruthers* v. *Payne* (*c*), doubted whether it would be followed if precisely the same facts came before the Court again.

(*a*) L. R. 7 Q. B. 454; 41 L. J. Q. B. 237.
(*b*) *Mucklow* v. *Maugles*, 1 Taunt. 318.
(*c*) *Carruthers* v. *Payne*, 5 Bing. 270.

*In *Woods* v. *Russell*(*d*), in 1822, Paton, a shipbuilder, con- [*185] tracted to build a ship for the defendant, to be paid for by four instalments. The first and second were duly paid. When the ship was nearing completion the defendants chartered her for a voyage, with Paton's privity, and she was measured, also with Paton's privity, to the intent that the defendant might have her registered in his own name. Paton signed the necessary certificate of her build, and she was registered in the defendant's name, and the third instalment was then paid. The ship was not finished, and Paton's men continued at work on her. Paton became bankrupt, and two days afterwards the defendant took possession, and by his orders a rudder and some cordage, which Paton had bought for the ship, were taken from Paton's premises. Two days after that she was launched. The fourth instalment was never paid. The Court considered that the rudder and cordage, having been bought specifically for the ship, although not actually attached to it, were on the same footing, and held that the property had passed in the ship, rudder and cordage (*e*).

In *Clarke* v. *Spence* (*f*) in 1836, the facts were much the same as in *Woods* v. *Russell* (*d*), and after consideration the Court held that the property had passed, and Williams, J., delivering the judgment of the Court, put the decision on what appears to be the true ground. After referring to the language of Abbott, C. J., in *Woods* v. *Russell* (*d*), he continued, "The payment of the instalments may "indeed be evidence that the purchaser has approved of the fabric "so far as it has been constructed, and may therefore, as it were, "ratify the appropriation made by the builder; but in itself it can "operate nothing, unless it be by the contract made a condition "precedent to the vesting of the property. It is not so made by "the contract in question in express terms; neither was it in the "case of *Woods* v. *Russell* (*d*); *but we apprehend that the [*186] "judgment in that case is founded on the notion that provision for "the payment regulated by particular stages of the work is made in "the contract, with a view to give the purchaser the security of cer- "tain portions of the work for the money he is to pay, and is "equivalent to an express provision that on payment of the first "instalment the general property in so much of the vessel as is "then constructed shall vest in the purchaser."]

In *Laidler* v. *Burlinson* (*g*), in 1837, a shipbuilder entered into an agreement with several parties, of whom the plaintiff Laidler was one, by which he was to complete a vessel then in his yard, and they were to take shares in the vessel and pay portions of the price. Before the vessel was complete Laidler, who was to take one-fourth of the vessel, paid the builder in advance, but that was voluntary

(*d*) *Woods* v. *Russell*, 5 B. & Ald. 942; 1 D. & R. 587.

(*e*) *Carruthers* v. *Payne*, in 1828, 5 Bing. 270; *Goss* v. *Quinton*, in 1842, 3 M. & G. 865; *Ex parte Lambton*, 1875, 10 Ch. Ap. 414; 44 L. J. Bank. 81.

(*f*) *Clarke* v. *Spence*, 4 A. & E. 448.

(*g*) *Laidler* v. *Burlinson*, 2 M. & W. 602.

on his part, as it was no part of the original agreement; then the builder became bankrupt, and the Exchequer decided that the property of the incomplete vessel was in the bankrupt, and consequently that his assignees were entitled to it, and that Laidler had no specific interest in the vessel. Parke, B., in the course of the argument said, that, "If the parties agreed to buy that particular "ship when complete, the property would not pass, though the "builder could not comply with the contract by delivering another "vessel." And in delivering judgment, Lord Abinger said, "A "man may agree to purchase a ship when finished, or as she then "stands. Of which sort is this contract? Did it pass the property "to the purchaser presently, or was it to pass when the ship was "finished? I think it is of the latter description." And Parke, B., said, "It was an entire contract to purchase the ship when fin-"ished, and no property passed till then."

[In *Tripp* v. *Armitage* (*h*), in 1839, Bennett had contracted to build an hotel for the defendants. Other parties had contracted for the painting, glazing, and ironwork. The money was to be paid by [*187] instalments, and at the time when Bennett *became bankrupt the defendants had advanced him more money than he was entitled to by the contract, on the security of all the materials which had been or should be brought by him on to the premises. Before his bankruptcy he had brought some window frames on to the premises, which had been approved of by the clerk of the works appointed by the defendants, and he had then taken them away to his own workshops for the purpose of having some pulleys fitted to them. Bennett's assignees claimed them, and the Court held that the property had not passed to the defendants. Both Lord Abinger, C. B., and Parke, B., put their judgments on the ground that this was not a contract of sale of a specific chattel, as in *Clarke* v. *Spence* (*i*) and other cases, but a contract to do work, *i. e.* to build an hotel, to which was incident the supplying and fixing of window frames. If the frames had been fixed to the freehold then the case would have been different, and the frames would have come within the agreement as having been brought upon the premises. The Court seems to have considered the case as an advance of money to enable a contractor to carry out his work made on the security of goods which had been at the date of the agreement, or might afterwards be, affixed to the freehold. The approval of the clerk of the works was considered to be merely an assent to the suitability of the materials (*k*).

In *Baker* v. *Gray* (*l*), in 1856, it was agreed that a shipbuilder should build a ship for the defendant, to be paid for by instalments,

(*h*) *Tripp* v. *Armitage*, 4 M. & W. 687.
(*i*) *Clarke* v. *Spence*, 4 A. & E. 448.
(*k*) See also *Williams* v. *Fitzmaurice*, in 1858, 3 H. & N. 844, where, however, this point does not appear to have been urged.
(*l*) *Baker* v. *Gray*, 17 C. B. 462; 25 L. J. C. P. 161.

and that the property in the ship should pass to the defendant on payment of the first instalment, and that in case the builder should not complete the vessel within the time agreed upon, it should be lawful for the defendant to take possession of and finish her, "using "such of the materials of the builder as should be applicable for "the purpose." The builder being in arrear, the defendant did take possession, and he also removed a considerable quantity *of [*188] timber which the builder had provided and prepared for the building of the ship, from the builder's yard and placed it inside the hull of the ship, but up to the date of the builder's bankruptcy, he had not actually used it in the construction of the ship. It was held that as he had not in fact used it, the property in the timber passed to the assignees on the bankruptcy (*m*).

In *Wood* v. *Bell* (*n*), in 1856, Joyce, a shipbuilder, agreed to build a steamship and engines for the plaintiff, to be paid for by instalments. The building of the ship and engines went on contemporaneously in the same yard. The plaintiff made advances to Joyce, which Joyce acknowledged to be advances on the ship. The ship and engines were built under the superintendence of the plaintiff's inspector, and the plaintiff's name was stamped on the keel. There was ample evidence that both the engines and a number of plates lying in the yard were appropriated to this contract, but neither the engines nor those plates had been fixed in their places. Joyce, before his bankruptcy, admitted that the ship belonged to the plaintiff. Lord Campbell, C. J., delivering the considered judgment of the Queen's Bench, held that the property in both the ship, and the engines and plates, had passed to the plaintiff, and this judgment was affirmed on appeal to the Exchequer Chamber so far as the ship was concerned, but reversed as to the engines and plates. Jervis, C. J., delivering his judgment, in which Pollock, C. B., Alderson, B., Cresswell, Crowder, Willes, JJ., and Bramwell, B., concurred, said, "the question is, what is the ship? not, what is "meant for the ship? I think those things pass which have been "fitted to the ship, and have once formed part of her, as, for in-"stance, a door hung upon hinges, although afterwards removed "for convenience. I do not think the circumstance that materials "have been fitted and intended for the ship makes them part of the "ship."

*The judgment of the Queen's Bench on this point seems [*189] to be the one more consistent with the recent authorities. If the true principle be, that where an advance is made on the security of specified although unfinished articles, the law considers that as every strong evidence to show that an intention to pass the property existed, then that argument, which is used to show that the property in the ship has passed, is precisely applicable to show that

(*m*) *Rouch* v. *Great Western Ry. Co.*, 1 Q. B. 51.

(*n*) *Wood* v. *Bell*, 5 E. & B. 772; and 25 L. J. Q. B. 148; 6 E. & B. 355; and 25 L. J. Q. B. 321.

the property in the engines and plates passed. The property should pass for the same reason, and not because one thing has become, or was intended to become, a part of the other (*o*).

In the *Anglo-Egyptian Navigation Company* v. *Rennie*, (*p*), in 1875, the plaintiffs were the owners of a steam ship whose engines and boilers required considerable repairs and many new parts. The defendants contracted to do the whole of the work for 5800*l.*, payment by instalments to be paid on the certificate of the plaintiff's inspector. The defendants proceeded with the work while the ship was at sea, and on the certificate being given received payment of one instalment. The plaintiffs then heard of the loss of the ship at sea, and in due course paid a second instalment. The defendants subsequently heard of her loss, and at the time of hearing of it had completed about three quarters of the work. The plaintiffs demanded from the defendants those parts which had been made and approved when the instalments were paid, on the ground that the property had passed to them. But the Court held that it had not passed, adopting Mr. Benjamin's argument that the complicated nature of the contract made it impossible to attribute the instalments to any particular part of the work; and that the object of the stipulation as to instalments was to lessen the defendants' risk, for they would not have been able to make a claim to a penny until the whole job had been completed but for that stipulation.]

Where by the agreement the vendor is to do things which [*190] *may be done after the goods are in such a state that the vendor might call upon the purchaser to accept them, the performance is not presumed to be a condition precedent to the vesting of the property. Thus where the vendor agrees to pay warehouse rent for the goods for some time after the sale, it has been decided that the property is transferred before the rent is paid. *Hammond* v. *Anderson* (*q*), in 1804, *Greaves* v. *Hepke* (*r*), in 1818.

There may be property by estoppel.

There are some cases in which it has been held that the property was changed, though acts necessary to put the goods in a deliverable state remained to be done by the vendor, but it will be found on examination that the party against whom it was held in those cases that the property was changed had more or less distinctly made a statement that it had been changed, and that the decisions were made on that ground. A party's statement is always evidence against himself. In general it is not conclusive against him, and he may set up as his case that his previous statement was a mistake

(*o*) See also *McBain* v. *Wallace*, in 1881, 6 Ap. Ca. 588.

(*p*) *Anglo-Egyptian Navigation Co.* v. *Rennie*, L. R. 10 C. P. 271; 44 L. J. C. P. 130.

(*q*) *Hammond* v. *Anderson*, 1 N. R. 69.

(*r*) *Greaves* v. *Hepke*, 2 B. & A. 131.

or even a falsehood, and then the question for those who try the cause is, whether his former statement or his present evidence is more worthy of belief. Much, of course, must depend, on the degree of deliberation with which the former statement was made, and the means which he had at the time of knowing the truth. But though in general a statement is not conclusive against the party who makes it, yet there are exceptions in which the law does not permit the party to avail himself of the inaccuracy of his assertion, and in technical language he is estopped from setting up the truth against his former statement. "The rule of law," said Lord Denman, in delivering the judgment of the King's Bench, in *Pickard* v. *Sears* (*s*), "is clear, that where one by his words *or conduct [*191] "wilfully causes another to believe the existence of a certain state "of things, and induces him to act on that belief so as to alter his "own previous position, the former is concluded from averring "against the latter a different state of things as existing at the same time." This is a rule which within the limits applied by law is of great equity; for when parties have agreed to act upon an assumed state of facts, their rights between themselves are justly made to depend on the conventional state of facts, and not on the truth. The reason of the rule ceases at once when a stranger to the arrangement seeks to avail himself of the statements which were not made as a basis for him to act upon. They are for a stranger, evidence against the party making the statement, but no more than evidence which may be rebutted, between the parties they form an estoppel in law. This principle is well illustrated by those cases that at first sight seem inconsistent with the rule of construction already mentioned.

Thus in *Stonard* v. *Dunkin* (*t*), in 1810, Knight had agreed to pledge some malt lying in the defendant's warehouse to the plaintiff, and the defendants gave a written acknowledgment that they held the malt for the plaintiff, who had advanced Knight 7500*l.* on that security. The plaintiff brought trover for the malt, and the defence was, that Knight had become a bankrupt, and that the property in the malt belonged to his assignees, because it had to be measured before the property would pass; but Lord Ellenborough said, "Whatever the rule may be between buyer and seller, it is "clear the defendants cannot say to the plaintiff the malt is not "yours, after acknowledging to hold it on his account. By so do-"ing they attorned to him, and I should entirely overset the secur-"ity of mercantile dealings were I now to suffer them to contest "his title."

In *Hawes* v. *Watson* (*u*), in 1824, the goods had been twice sold, and the first vendors were unpaid. The plaintiffs were *bonâ fide*

(*s*) *Pickard* v. *Sears*, 6 A. & E. 474. See also *Carr* v. *L. & N.-W. Ry. Co.*, L. R. 10 C. P. 316; 44 L. J. C. P. 113.
(*t*) *Stonard* v. *Dunkin*, 2 Camp. 344.
(*u*) *Hawes* v. *Watson*, 2 B. & C. 540.

[*192] purchasers, and had *bonâ fide* paid their immediate *vendor, the first purchaser, who had since become a bankrupt. The action was trover, brought against the warehousemen. It was proved that the first sale to the bankrupt was at a certain price per cwt., and that the goods had never been weighed, and the defence was that they remained the property of the first vendors, and not having been the property of the first purchaser, could not have been by him rendered the property of the plaintiffs; but it was proved that before the plaintiffs paid the bankrupt, the defendants had signed a note, acknowledging that by order of the bankrupt they had transferred the goods to the account of the plaintiffs. Abbott, C. J., at Nisi Prius, ruled, that whatever might be the rights of the original vendors, the defendants having acknowledged that they held the goods on account of the plaintiffs could not now dispute their title, otherwise they would cause an innocent man to lose his money. The plaintiffs had a verdict, and the Court of King's Bench refused to disturb it.

In *Gosling* v. *Birnie* (*x*), in 1831, in the Court of Common Pleas, the partially paid vendor of some timber lying on the defendant's wharf had given the purchaser notice that if he did not pay the residue of the price the timber should be resold. The vendor accordingly did resell the timber to the plaintiff, and gave him a written order on the defendant, at whose wharf the goods lay, to deliver the timber on receiving payment of a sum of money. The defendant, who knew all the facts, received the money, and verbally assented to hold the timber for the plaintiff; then the first purchaser paid the vendor the balance of the price, and the defendant gave him possession of the timber; for so doing the plaintiff brought an action of trover, to which the defence was that the plaintiff was not the owner of the goods, which were the property of the first purchaser. The Court, however, said that whether the resale was void as against the first purchaser or not might be a question, but that as against the defendant the case was clear. "The defen- [*193] dant," said Tindal, C. J., "is estopped by *his own admis- "sions, for unless they amount to an estoppel the word may as "well be blotted from the law."

[In *Holl* v. *Griffin* (*y*), in 1833, one Wilson having goods at a wharfinger's at Stockton-upon-Tees, which were about to be sent to the defendant's wharf in London, obtained an advance from the plaintiff, on the security of the goods, giving him the Stockton wharfinger's receipt and the invoice, and at the same time instructing the defendants to deliver the goods to the plaintiff when they should arrive. The plaintiff showed the wharfinger's receipt to the defendants, who promised to deliver the goods, but refused to do so when they arrived, and the Court held that trover would lie.]

(*x*) *Gosling* v. *Birnie*, 7 Bing. 339.
(*y*) *Holl* v. *Griffin*, 10 Bing. 246.

In *Gillett* v. *Hill* (z), in 1834, the defendant, who was a wharfinger, had accepted, without any restriction, a delivery order for twenty sacks of flour given to the plaintiff by a person from whom he had purchased them, and the Exchequer held, that by so doing the wharfinger made evidence against himself that he had twenty specific sacks belonging to the vendor, which he appropriated to the order, and that the jury, in action of trover against the wharfinger, were warranted in finding that the property had been transferred to the purchaser in some specific sacks in his custody. It does not appear that the purchaser had paid the vendor or otherwise altered his condition in consequence of the defendant's acts, so that probably the case did not amount to an absolute estoppel.

[In *Woodley* v. *Coventry* (a), in 1863, Clarke had purchased 350 barrels of flour from the defendants: the flour was lying in the defendants' warehouse and was part of a larger quantity; the 350 barrels so purchased were not separated from the rest. Clarke wishing to raise money, applied to the plaintiffs for an advance, and gave them a delivery order on the defendants. The plaintiffs before making the advance sent a clerk with it to the defendants' *warehouse, who made enquiry whether it was "all in [*194] order," and was answered "Yes," and thereupon lodged the order at the warehouse and it was accepted. The plaintiffs then advanced the money to Clarke, who subsequently absconded without paying the defendants for the flour; the defendants, as unpaid vendors, refused to deliver the flour to the plaintiffs. The plaintiffs brought trover. The Court held that they were entitled to recover; the question being, had the defendants acknowledged that they held the flour on behalf of the plaintiffs; if so, they were bound to deliver it or pay damages (b).

The case of *Knights* v *Wiffen* (c), in 1870, very closely resembles *Woodley* v. *Coventry* (d). The facts are set out in Mr. Justice Blackburn's judgment, of which the following is an extract: "The "defendant Wiffen had in his own warehouse a large quantity of "barley, and he sold to Maris, 80 qrs., which on the contract "between him and Maris, remained in his possession as unpaid "vendor. No particular sacks of the barley were appropriated as "between Maris and Wiffen; but at the time the contract was "made Maris had a right to save 80 qrs. out of that barley appro-"priated to him; and at the same time Wiffen, as the unpaid "vendor, had a right to assist on the payment of the price before "any part of the grain was given up. Maris afterwards entered "into a contract with the plaintiff, Knights, by which he sold him

(z) *Gillett* v. *Hill*, 2 C. & M. 536.
(a) *Woodley* v. *Coventry*, 2 H. & C. 164; 32 L. J. Ex. 185.
(b) *Stoveld* v. *Hughes*, 14 East, 308; and *McEwan* v. *Smith*, 2 H. L. R. 309; 13 Jur. 265.
(c) *Knights* v. *Wiffen*, L. R. 5 Q. B. 660; 40 L. J. Q. B. 51.
(d) *Woodley* v. *Coventry*, 2 H. & C. 164; 32 L. J. Ex. 185.

"60 qrs. of the barley, and Knights paid for them. A document "was given by Maris to Knights, in the shape of a delivery order "addressed to a station-master of the Great Eastern Railway, "instructing him to deliver to Knights' order 60 qrs. of the barley "on his, Maris's, account. Knights forwarded it to the station-"master, enclosed in a letter authorising the station-master to "hold for him. The station-master went to Wiffen and showed [*195] "him the delivery *order and letter, and Wiffen said, "'All right, when you receive the forwarding note, I will "'place the barley on the line.' What does that mean? It amounts "to this, that Maris having given the order to enable Knights to "obtain the barley, Wiffen recognized Knights as the person "entitled to the possession of it. * * * The defendant knew, "that when he assented to the delivery order, the plaintiff, as a "reasonable man, would rest satisfied. If the plaintiff had been "met by a refusal on the part of the defendant, he could have gone "to Maris and have demanded back his money; very likely he "might not have derived much benefit if he had done so, but he "had a right to do it. The plaintiff did rest satisfied in the belief, "as a reasonable man, that the property had been passed to him. "If once the fact is established, that the plaintiff's position is "altered by relying on the statement and taking no steps further, "the case becomes identical with *Woodley* v. *Coventry* (*e*), and "*Hawes* v. *Watson* (*f*)."

In *Coventry* v. *Great Eastern Railwag Co.* (*g*), in 1883, the defendants negligently gave two delivery orders for the same consignment. The plaintiff in good faith made advances on both, and the Court of Appeal held that the defendants were estopped from denying that they held two consignments.]

It is evident that those cases are not authorities that the property had in reality been transferred, but merely that the plaintiffs had a right as against the defendants to treat it as if it had been transferred. A warehouseman may make himself responsible to both parties: to one because he has rendered himself incapable of denying that the property belongs to that party, though in truth it does not; and to the other, because the property in truth is his. This may at times be very hard upon the warehouseman, who has by mistake represented that the property has been transferred, when [*196] in fact it has not, but it behoves him to see that his *representations are not merely *bonâ fide* but accurate, or to abide the consequences of his inaccuracy.

Effect of Express Conditions Precedent.

The parties may indicate an intention by their agreement, to

(*e*) *Woodley* v. *Coventry*, 2 H. & C. 164; 32 L. J. Ex. 185, *ante*, p. 193.
(*f*) *Hawes* v. *Watson*, 2 B. & C. 540, *ante*, p. 191.
(*g*) *Coventry* v. *G. E. Ry. Co.*, 11 Q. B. D. 776; 52 L. J. Q. B. 694.

make any condition, precedent to the vesting of the property, and if they do so their intention is fulfilled. Thus if goods are sent for sale on approval or return, no property vests until the purchaser's approval, because that was the intention of the parties (*h*). And, as is said in Comyn's Digest, Condition (B. 13), "if a per-"sonal thing be granted on a condition precedent, the property does "not vest till the condition performed."

[And so also in sales by sample no property will pass, until the vendee has compared the bulk with the sample and assented to the appropriation (*i*), although it is very strong evidence that the goods have been approved of, if they are kept a longer time than is reasonably necessary under the circumstances (*k*).]

In the interval between the making of the agreement and the fulfilment of those conditions on which the property is to vest the purchaser has no interest in the thing itself; and it follows as a necessary consequence that if in the interval a third party has fairly acquired an interest in the chattel, the purchaser cannot on the fulfilment of the conditions deprive him of it. He may have a remedy against the vendor for breaking his agreement, by suffering this interest to be created, but he cannot take the property in derogation of a right acquired, whilst the agreement was only executory and he had no interest in the goods but only a chose in action.

*Thus in *Mires* v. *Solesby* (*l*), in 1678, the owner of some [*197] sheep agreed with Alston that Alston should take the sheep home and pasture them until an agreed time, at so much a week, and if at the end of that time Alston would pay so much for the sheep, he should have them. Before the time was expired the owner sold the sheep to Mires, and in an action of trover by Mires against the servant of a purchaser from Alston, the Court decided that the agreement that Alston should have the sheep if he would pay such a sum of money at a future day, did not amount to a sale, and consequently that the sale to the plaintiff before that day was good, and the property of the sheep was in him.

But if the conditions are fulfilled, and the agreement made absolute whilst the vendor remains owner of the goods, it seems that the agreement has the same effect as if it were then for the first time made without any condition, and consequently that the property passes at once.

In *Evans* v. *Thomas* (*m*), in 1608, it is said, "If one covenants "with another, that if he will marry his daughter he shall have

(*h*) *Swain* v. *Shepherd*, 1 M. & Rob. 223.

(*i*) See *post*, p. 205. Conditions precedent as to quality. See also *Jenner* v. *Smith*, in 1869, *ante*, p. 136, L. R. 4 C. P. 270.

(*k*) *Beverly* v. *Lincoln Gas Light Co.*, in 1837, 6 Ad. & El. 829; *Moss* v. *Sweet*, in 1851; 16 Q. B. 493; 20 L. J. Q. B. 167; *Ray* v. *Barker*, in 1879, L. R. 4 Ex. D. 279; 48 L. J. Ex. 569; *Couston* v. *Chapman*, in 1872, L. R. 2 Sc. Ap. 250; *Sanders* v. *Jameson*, in 1848, 2 Car. & Kir. 557, on custom in such cases.

(*l*) *Mires* v. *Solesby*, 2 Mod. 243.

(*m*) *Evans* v. *Thomas*, Cro. Jac. 172.

"such a flock of sheep. He marries his daughter, the property of "the sheep were presently in him, for it was but a personal thing, "and the covenant is a grant." For this proposition, *Fitzherbert*, (44 E. 3) is cited, but no such case is in the Year Book of that date.

In a case at Nisi Prius (*n*), in 1811, Norton and Fitzgerald drew a draft on Voss, and indorsed it to the plaintiff; they at the same time transmitted to him a bill of lading of some goods with an indorsement, making the goods deliverable to Voss, if he should "accept and pay" the draft, if not to the holder of the draft. [Both the bill of exchange and the bill of lading were sent to Voss, who accepted the bill of exchange, but did not pay it, and indorsed the bill of lading to the defendant.] Lord Ellenborough held, that after the dishonour of the draft, the plaintiff might maintain trover [*198] against the indorsee *of the bill of lading, who had obtained possession of the goods. It seems, however, probable that the plaintiffs had some right of the property in the goods, independently of being holders of the draft at the time it was dishonoured, though that is not mentioned in the report (*o*).

[In the sale of goods, the parties frequently agree to conditions precedent to other things besides the passing of the property; for example, to the duty of the vendor to deliver, or of the vendee to receive or pay for the goods. The parties are at liberty to import into the contract any terms they may please.

But it may be a question of some difficulty to decide whether a term or stipulation which forms part of the contract, creates a condion precedent, or is a mere collateral contract of warranty, for the breach of which the remedy is an action for damages. This is a question of law; as Williams, J., said in *Behn* v. *Burness* (*p*), in 1863, where a charter-party stated a ship to be "now in the Port of Amsterdam" when she was not so. "It is no part of the judge's "duty to leave to the jury any question as to the construction of "the contract, or the materiality of any of its statements. It was "his function to construe the contract with the aid of surrounding "circumstances found by the jury, and to decide for himself whether "the statement that the ship was in the port, supposing it to be un-"true, was an essential part of the contract, or a mere representa-"tion."

The meaning of the contract is that which both parties intended it should have; it is therefore the common intention of the parties which has to be looked for, and where they have reduced their contract into writing, that, if it is not ambiguous, is conclusive evidence of their intention, and to put a meaning on the contract is simply a question of construction for the judge, but if it is ambiguous, so that the intention cannot be read on the face of the document, [*199] then *the judge may look at the surrounding facts and cir-

(*n*) *Barrow* v. *Coles*, 3 Camp. 92.
(*o*) See *post*, p. 268. Chapter on Equitable Assignments.
(*p*) *Behn* v. *Burness*, 3 B. & S. 756; 33 L. J. Q. B. 204.

cumstances as found by the jury to assist him in discovering what it was that the parties probably intended. But, as Brett, M. R., said in *Sanders* v. *McClean* (*q*), "The Court has no right to import "anything into a contract which it would not be clear to every rea-"sonable man must have been present to the minds of both contract-"ing parties, and agreed to by both."

Lord Ellenborough, C. J., in *Ritchie* v. *Atkinson* (*r*), in 1808, where the question was, whether the delivery of a complete cargo was a condition precedent to the right to recover freight, a short cargo having been delivered, said, "that depends, not on any formal "arrangement of the words, but on the reason and sense of the "thing, as it is to be collected from the whole contract: * * * "The rule was well laid down by Lord Mansfield in *Boone* v. *Eyre* "(*s*), that where mutual covenants go to the *whole* of the considera-"tion on both sides, they are mutual conditions, the one precedent "to the other; but where the covenants go only to a part, there a "remedy lies on the covenant to recover damages for the breach of "it; but it is not a condition precedent."

Bramwell, B., in *Roberts* v. *Brett* (*t*), in 1859, said, "Wherever "the obvious good sense of the thing makes the performance of an "act a condition precedent, it ought to be so construed. * * * The "rules laid down in the notes to *Pordage* v. *Cole* (*u*) are very ex-"cellent guides, but not arbitrary tests." And Jervis, C. J., in the same case, said (*x*), "Where, on the whole, it is apparent that the "intention is, that that which is to be done first is not to depend "upon the performance of the thing that is to be done afterwards "the parties are relying on their remedy, and not on the *per- [*200] "formance of the condition; but, where you plainly see that it is "their intention to rely on the condition, and not on the remedy, "the performance of the thing is a condition precedent."

Where there is a condition precedent to the duty of either party to do some act, it is a good defence to an action for not doing that act to say that the condition precedent has not happened or been performed. But that defence is no longer available if the party wishing to set it up has waived his right to insist upon the performance of it, as, for example, where, after the time when the condition ought to have been performed, he accepts any benefit under the contract. As where goods on sale or return are kept an unreasonable time.

In the same way, payment is *primâ facie* a condition precedent to the right to have the goods delivered. But where the parties have agreed upon some other time for payment, as by taking a bill

(*q*) *Sanders* v. *McClean*, 11 Q. B. D. 336; 52 L. J. Q. B. 481.
(*r*) *Ritchie* v. *Atkinson*, 10 East, 306.
(*s*) *Boone* v. *Eyre*, 6 T. R. 573.
(*t*) *Roberts* v. *Brett*, 6 C. B. N. S. 633.
(*u*) *Pordage* v. *Cole*, 1 Will. Saunders, 548.
(*x*) 18 C. B. 573.

or otherwise giving credit, the purchaser is entitled to possession of the goods at once, and payment ceases to be a condition precedent.

In cases where there was a condition precedent, it may often happen that although the unperformed condition cannot be made available as a defence to the action, yet it may be treated as a warranty, for the breach of which a cross-action or counterclaim for damages might lie; but this is not invariably the case. To take Mr. Justice Blackburn's example in the *Calcutta Co.* v. *De Mattos* (*y*), the parties may agree that the price shall be payable only on the contingency of the goods arriving, or should not be payable unless a particular tree fall, but without any contract on the vendor's part to procure the goods to arrive, or to cause the tree to fall. This branch of the subject will be treated at greater length in the chapter on the remedies of the parties (*z*).

Among the following cases will be found examples of conditions precedent, such as frequently occur in contracts of sale.

[*201] *The cases on conditions precedent will now be considered in the following order :—1st. As to payment (below) ; 2nd. As to quality, page 205 ; 3rd. As to quantity, page 215 ; 4th. As to time, page 224 ; 5th. As to arrival and delivery, page 230 ; 6th. As to insurance and other conditions, page 239.

In *Walley* v. *Montgomery* (*a*), in 1803, the vendor refused to deliver the goods until paid in cash, and the Court nonsuited the consignee, thinking that the consignment was conditional, but set the nonsuit aside on forming another opinion of the contract.

In *Valpy* v. *Oakley* (*b*), in 1851, the vendor had contracted to deliver iron, and received the vendee's acceptances for the whole of the iron. The vendee became bankrupt before the whole had been delivered, and the vendor refused to deliver any more. The Court held, that the vendee's assignees were only entitled to nominal damages.

As to Payment (*c*).

In *Key* v. *Cotesworth* (*d*), in 1852, where goods had been consigned by the plaintiffs to the defendants, and the bill of lading sent direct to them. At the same time a draft had been sent by the plaintiffs to their agents to be presented to the defendants for acceptance. The defendants obtained possession, but refused to accept, and the Court held that the passing of the property was not conditional on the acceptance.

(*y*) *Calcutta Co.* v. *De Mattos*, 32 L. J. Q. B. 322; 33 L. J. Q. B. 214.
(*z*) *Post*, p. 445.
(*a*) *Walley* v. *Montgomery*, 3 East, 585.
(*b*) *Valpy* v. *Oakley*, 16 Q. B. 941 ; 20 L. J. Q. B. 380. See also *Griffiths* v. *Perry*, 1 E. & E. 680 ; 28 L. J. Q. B. 204 ; and *Ex parte Chalmers*, 8 Ch. Ap. 289 ; 42 L. J. Ch. 37, *post*, p. 474, and cases following.
(*c*) See *post*, p. 449.
(*d*) *Key* v. *Cotesworth*, 7 Ex. 595 ; 22 L. J. Ex. 4.

In *Godts* v. *Rose* (*e*), in 1855, the sale was of five tons of oil "to be free delivered and paid for in fourteen days." The sale was not of any specific oil, but the vendor who had oil answering the description lying at a wharf gave authority *to the [*202] wharfinger to transfer certain casks into the defendant's, the buyer's, name; and then sent a clerk with a transfer order to the defendant, and instructed the clerk to exchange it for a cheque. The defendant, having got possession of the transfer order, refused to give a cheque. The clerk then returned to the wharfinger and ordered him not to deliver the oil; but, notwithstanding this, the wharfinger did deliver it to the defendant, and the plaintiff brought trover. The Court held that the property had not passed. Willes, J., said, "the buyer takes the transfer order, but declines to "give the cheque: he does not assent to the appropriation of the "particular casks of oil as a fulfilment of the contract, upon the "terms upon which alone the seller was content to make it" (*f*).

In *Shepherd* v. *Harrison* (*g*), in the House of Lords, in 1871, the plaintiff, who was a merchant in Manchester, instructed Paton, Nash and Co., of Pernambuco, to purchase for him cotton not exceeding 1,000 bales. For the purpose of carrying out the contract, Paton, Nash and Co. purchased 747 bales and consigned 547 of them to Liverpool, sending the bills of lading for the 547 bales, together with two bills drawn on the plaintiff, to their Liverpool correspondents, G. Paton and Co., by whom they were handed to the plaintiff, who accepted the bills and paid them at maturity. Paton, Nash and Co. subsequently shipped the remaining 200 bales in respect of which this case arose on board the defendants' ship the *Olinda*, taking the bill of lading to order or assigns, and wrote to the plaintiff saying, "Enclosed please find invoice and bill of "lading of 200 bales of cotton." The invoice stated the cotton to be at the risk of the plaintiff. Paton, Nash and Co. did not, however, in fact, enclose the bill of lading to the plaintiff, but having endorsed it "Paton, Nash and Co.," sent it to G. Paton and Co., together with a draft for the plaintiff's acceptance. When G. Paton and Co. *received the bill of lading and the draft they wrote [*203] to the plaintiff, "We beg to enclose bill of lading for 200 bales "cotton shipped by Messrs. Patton, Nash and Co., *per Olinda*, s.s., "on your account. We hand also their draft on your good selves "for cost of the cotton, to which we beg your protection." The plaintiff retained the bill of lading, and returned the draft unaccepted. The defendants, the shipowners, on being indemnified by G. Paton and Co., refused to deliver up the cotton. The Court

(*e*) *Godts* v. *Rose*, 17 C. B. 229; 25 L. J. C. P. 61.

(*f*) See also *Sheridan* v. *New Quay Co.*, *ante*, p. 157, 28 L. J. C. P. 58; 4 C. B. N. S. 618.

(*g*) *Shepherd* v. *Harrison*, L. R. 4 Q. B. 197 and 493; 5 E. & I. Ap. 116; 38 L. J. Q. B. 105 and 177; 40 L. J. Q. B. 148.

gave judgment for the defendants (*h*). Cockburn, C. J., said, "The cases are certainly very strong indeed, and conclusive to "show, supposing the consignor of goods sends them to this "country accompanied by bills of lading and bills of exchange "which are to be accepted by the consignee of the goods as the "consideration for the consignment, that where the consignor sends "those documents direct to the consignee that ought to lead to the "inference, and only properly lead to the inference, that he "intended the consignee should have at once the disposal of the "property and possession of the goods consigned; leaving to him, "as a matter simply of obligation under the contract, to return the "bills of exchange accepted, not as a condition precedent to the "property vesting, but simply as a matter of contract. But, on the "other hand, the authorities are equally good, to my mind, to show, "where the consignor sends the bill of lading to an agent in this "country to be by him handed over to the consignee, and accompa-"nies that with bills of exchange to be accepted by the consignee, "that that indicates a different intention, viz., that the handing "over the bill of lading and the acceptance of the bill or bills of "exchange should be concurrent parts of one and the same trans-"action."

It was contended for the plaintiff that he had been drawn on for [*204] a larger sum than was due for the price of the goods; *but, said Kelley, C. B., "Possibly he was not bound to accept the bill, "* * * But, at all events, he had no right to repudiate the con-"tract in part: if he did not accept the bill, he could have no "right to the goods."

In the case of *Mirabita* v. *The Imperial Ottoman Bank* (*i*), in 1878, the plaintiff, a merchant carrying on business at Malta and Constantinople, agreed to purchase umber from Phatsea and Pappa, a firm of merchants at Larnaca. When Phatsea and Pappa had 600 tons ready for shipment they chartered a ship to carry the umber to London, taking the bills of lading "to order or assigns." They then drew a bill on the plaintiff, which was discounted with the defendant's agents at Larnaca, with the bill of lading attached. By a subsequent arrangement the defendant's agents returned this bill of exchange, and a second was drawn by Phatsea and Pappa on Mirabita Brothers, of London, in favour of Corkji, from whom they had purchased the umber. And Corkji handed it to the defendant's agents in substitution of the first one, with instructions to them to send it and the bills of lading to London, and there to deliver the bills of lading to Mirabita Brothers on payment of the bill of exchange at maturity. The defendants left the bill of exchange at the office of Mirabita Brothers attached to the following

(*h*) And this judgment was affirmed in the Exchequer Chamber, L. R. 4 Q. B. 493; 38 L. J. Q. B. 177; and in the House of Lords, 5 E. & I. Ap. 116; 40 L. J. Q. B. 148.

(*i*) *Mirabita* v. *The Imperial Ottoman Bank*, 3 Ex. D. 164; 47 L. J. Ex. 418.

note, "Bill of lading * * * to be given up against the payment of attached draft." F. Mirabita returned the bill of exchange without having accepted it, but stated that he would pay at maturity. The ship having arrived, the defendants had the cargo entered in their names; and on the same day, F. Mirabita called on the defendants and offered to pay the bill and receive the bills of lading, but the defendants refused to give them up on the ground that they had taken possession of the cargo, and so made themselves liable for freight. The defendants sold the umber. It was found, as a fact, that the intention was to pass the property on shipment to the plaintiff subject to a lien for the price. *And [*205] although there was no contract between the plaintiff and the defendants, yet the Court held that the plaintiff could recover, as the bills of lading should have been handed to Mirabita Brothers on tender of payment of the bill of exchange.

In *The Mersey Steel and Iron Co.* v. *Naylor* (*k*), in the House of Lords in 1884, Naylor and Co. contracted to purchase 5,000 tons of steel from the Mersey Co., delivery 1,000 tons monthly, payment within three days after receipt of shipping documents. The Mersey Co. in the first month delivered only 332 tons, and delivered 260 tons in the early part of the next month. Before payment became due, a petition to wind up the Mersey Company was presented, and Naylor and Co. being advised (although wrongly) that under the Companies Acts they could not safely make any payments until the petition had been diposed of, declined to pay. The Mersey Co. then refused to make any further deliveries, and it was argued for them that the payment for each delivery was a condition precedent to the right to the next delivery, but both the Court of Appeal and the House of Lords held that it was not so.

As to Quality and Condition.

Examples of conditions precedent as to quality have already been referred to (*l*) when speaking of sales on approval and by sample.

In *Lorymer* v. *Smith* (*m*), in 1822, the defendant, the purchaser, had contracted to buy two parcels of wheat by sample, one parcel being 700 bushels and the other 1,400. The purchaser called to inspect the wheat in bulk, and had the right to demand immediate delivery if he wished it; but the plaintiff would not allow him to see the larger parcel, *although he allowed him to inspect [*206] the smaller. The defendant then declined to take any of the wheat. Some days afterwards, the plaintiff told the defendant he might inspect it, but the defendant declined, and obtained a verdict. The

(*k*) *The Mersey Steel and Iron Co.* v. *Naylor*, 9 Q. B. D. 648; 9 Ap. Ca. 434; 51 L. J. Q. B. 576; 53 L. J. Q. B. 497.

(*l*) *Ante*, pp. 141, 196.

(*m*) *Lorymer* v. *Smith*, 1 B. & C. 1. See also *Howe* v. *Palmer*, in 1820, 3 B. & Ald. 321.

Court refused a new trial, Abbott, C. J., saying, "By the usage of "the place, the buyer had a right to inspect the wheat in bulk; "which is so reasonable, that without any such usage, the law would give him that right."

And in *Isherwood* v. *Whitmore* (*n*), in 1843, where the purchaser refused to accept goods tendered to him in closed casks, which he was not allowed to open, Parke, B., said, "A tender of goods does not mean "a delivery or offer of packages containing them, but an offer of "those packages under such circumstances that the person who is to "pay for the goods shall have an opportunity afforded him, before "he is called on to part with his money, of seeing that those pre-"sented for his acceptance are in reality those for which he has "bargained."

In *Hutchinson* v. *Bowker* (*o*), in 1839, the defendants offered to sell good barley; the plaintiffs accepted the offer, but for fine barley; the defendants declined to deliver fine barley. The jury found good and fine meant different qualities in the trade, and it was held that there was no contract. There can be no doubt that if there had been a contract for fine barley, and good barley had been tendered, the purchaser could not have been called on to accept it.

In *Pettitt* v. *Mitchell* (*p*), in 1842, the plaintiff, an auctioneer, sold by auction to the defendant a quantity of goods, to be paid for before delivery. The biddings were at so much per yard. The defendant refused to pay for the goods unless before doing so he was allowed to inspect an measure them. It was not denied that if it should turn out on measurement after payment that the defendant had been called upon to pay too much, he would be entitled to [*207] a return of part of the *purchase money, but his right to inspect before payment was contested, and the Court held that he had no such right. There were conditions of sale inconsistent with this supposed right, but Tindal, C. J., put his judgment on the broad ground of the inconvenience of implying such a condition.

The case of *Toulmin* v. *Hedley* (*q*), in 1845, was an action for the price of a cargo of guano which the defendant, the vendee, refused to accept, on the ground that it did not correspond with the warranty. The contract was for a cargo expected by the ship "Sarah," "quality warranted equal to average imports from Ichaboe, and in sound and merchantable condition." Cresswell, J., directing the jury, said, "It is true that this was a contract for a "specific cargo; but it had not been seen by the defendants; and I "think, therefore, that before accepting it, he was entitled to look "at it, in order to see whether it corresponded with the terms of "warranty or not; and that, if it did not, he was entitled to reject "it."

(*n*) *Isherwood* v. *Whitmore*, 11 M. & W. 347; 12 L. J. Ex. 318.
(*o*) *Hutchinson* v. *Bowker*, 5 M. & W. 535.
(*p*) *Pettitt* v. *Mitchell*, 4 M. & Gr. 819; 12 L. J. C. P. 9.
(*q*) *Toulmin* v. *Hedley*, 2 Car. & Kir. 157.

In *Bull* v. *Robinson* (*r*), in 1854, the defendant refused to accept iron which was perfectly good when dispatched from Staffordshire, on the ground that it was not in a merchantable condition. It had suffered a certain amount of deterioration by rusting on its way to Liverpool. The Court, on the motion for a new trial, was of opinion that if the deterioration was necessary and unavoidable, the defendant must accept.

In *Nichol* v. *Godts* (*s*), in 1854, the plaintiff had sold to the defendant "the five under-mentioned parcels of foreign refined rape oil * * * warranted only equal to samples." The defendant accepted part of the oil, but refused to take the residue, on the ground that it was not foreign refined rape oil, but a mixture of hemp and rape oil. The samples consisted of rape oil adulterated with hemp oil, and the oil tendered corresponded with the samples, and on this ground *the plaintiffs contended that the defendants were [*208] bound to accept the oil, although they admitted it was not foreign refined rape oil. The jury found that there was no usage in the trade that rape oil meant a mixture of rape and hemp oil, and found a verdict for the defendant, which the Court refused to disturb, on the ground that the thing tendered must answer the description of it in the contract as to its character. Parke, B., said, "The warranty affects only the quality, but not the nature of the "article itself."

In *Wieler* v. *Schilizzi* (*t*), in 1856, the plaintiff had contracted to purchase from the defendant, and had accepted a large quantity of Calcutta linseed tale quale, at the date of the contract on board certain ships, and now brought this action for breach of an alleged warranty that the seed was Calcutta linseed, whereas in fact it contained a large admixture of rape and mustard seed. The defendant denied any warranty. There was evidence that all linseed sent to this country contains about two or three per cent. of other seeds. But according to the plaintiff's evidence, the seed in question contained about fifteen per cent. The plaintiff had, however, sold it as linseed, and the buyers had used it as such. The question left to the jury was, whether there was such an admixture of foreign substances as to alter the distinctive character of the article, and prevent it from answering the description of it in the contract—more, in truth, than might reasonably be expected. The jury returned a verdict for the plaintiff, and on the motion for a new trial the Court held that this was no misdirection. Willes, J., said, "The pur-"chaser had a right to expect, not a perfect article, but an article "which would be saleable in the market as Calcutta linseed. If he "got an article so adulterated as not reasonably to answer that de-"scription he did not get what he bargained for." Although the

(*r*) *Bull* v. *Robinson*, 10 Ex. 342; 24 L. J. Ex. 165.
(*s*) *Nichol* v. *Godts*, 10 Ex. 191; 23 L. J. Ex. 314.
(*t*) *Wieler* v. *Schilizzi*, 17 C. B. 619; 25 L. J. C. P. 89.

plaintiff chose to accept the seed, it seems clear that he might have refused to accept it had he chosen to do so.

[*209] **Vernede* v. *Weber* (*u*), in 1856, was an action by the purchaser for non-delivery. The contract was for a cargo of 400 tons of Aracan Necrensie rice, with a proviso that the cargo might partly consist of Larong rice, but not to a greater extent than 50 tons. The defendant refused to deliver a cargo which consisted of 285 tons of Larong and 159 of Latourie, and no Aracan Necrensie, on the ground that it was not a cargo of Aracan Necrensie, and the Court said, "Unless the cargo was what would substantially satisfy "the description of a cargo of Aracan Necrensie rice, we think that "the plaintiffs could not have been bound to accept it" * * * "and if the plaintiff would not have been bound to accept the "cargo brought, the defendant was not obliged to deliver it, for the "contract must be mutual and reciprocal."

Levy v. *Green* (*x*), in 1857, was a case where the defendant gave an order for crockery of certain descriptions to the plaintiff's traveller, which the plaintiff packed in a crate larger than was necessary, and he then filled it up with crockery not ordered, apparently on sale or return. The defendant refused to accept any of the articles. Lord Campbell, C. J., and Wightman, J., were of opinion that the defendant would be put to trouble, risk, and expense beyond what by the contract he was to incur, and was therefore not bound to accept. Coleridge and Erle, JJ., were of the opposite opinion, Coleridge, J., being of opinion that where goods came mixed, they could not be rejected if they were distinguishable. But neither of these judges appear to have refuted Lord Campbell's view, which was subsequently held to be the correct one by the Exchequer Chamber (*y*).

Bannerman v. *White* (*z*), in 1861, was an action brought to recover the price of hops delivered. The plaintiff, who was the ven- [*210] dor, had alleged at the time of the sale that there was *no sulphur in the hops, which in fact was not true, as sulphur had been used. It was admitted that the defendants would not have bought the hops if they had known that fact; and although the hops delivered corresponded with the sample, the Court held that the defendant might refuse to pay the price, on the ground that the stipulation that no sulphur had been used amounted to a condition that the hops might be rejected if sulphur had been used; it was the condition upon which the defendants contracted, and Erle, C. J., said, "We think that the intention appears that the contract "should be null if sulphur had been use."

The case of *Josling* v. *Kingsford* (*a*), in 1863, is a striking illus-

(*u*) *Vernede* v. *Weber*, 1 H. & N. 311; 25 L. J. Ex. 326.
(*x*) *Levy* v. *Green*, 1 E. & E. 969; 28 L. J. Q. B. 319.
(*y*) See also *Nicholson* v. *Bradfield Union*, L. R. 1 Q. B. 620; 7 B. & S. 747; 35 L. J. Q. B. 176.
(*z*) *Bannerman* v. *White*, 10 C. B. N. S. 844; 31 L. J. C. P. 28.
(*a*) *Josling* v. *Kingsford*, 13 C. B. N. S. 447; 32 L. J. C. P. 94.

tration of the distinction between a condition precedent and a warranty. The vendor, who was the defendant, was sued in one count for not delivering oxalic acid according to contract, and in another count for breach of warranty.

Before making the contract, which was entered into by correspondence, a clerk of the plaintiff's, with the defendant, had examined both samples and the bulk of the oxalic acid, and considered it of good quality, and fit for the purpose for which it was wanted. In one of the defendant's letters to the plaintiff, he said, "As regards the strength of the oxalic, your friend having already examined the bulk, we decline all responsibility in this respect." The substance which was delivered was analysed and found to contain 10 per cent. of sulphate of magnesia, and it was proved that the presence of this body could not be detected by mere inspection. The case was tried by Erle, C. J., who directed the jury that there was no evidence of any warranty, but that the defendant could only perform his part of the contract by delivering that which, in commercial language, might properly be said to come under the denomination of oxalic acid. The plaintiff then obtained a verdict. And on the motion for a new trial on the ground of misdirection which the Court refused to grant, holding the direction to have been the proper one, Williams, J., said, "However completely the defendant may *" have guarded himself against contracting [*211] "that the thing was of any particular quality, it is not possible to "construe the" contract in any other way than that it was a part of "the agreement that the subject of the sale should be the oxalic "acid of commerce."

Hopkins v. *Hitchcock* (*b*), in 1863, was an action againt the purchaser for refusing to accept certain iron bars. A firm of iron manufacturers, named Snowden and Hopkins, stamped the letters "S. & H." with a crown, on the iron made by them. After Snowden retired from the business, Hopkins, who was the plaintiff, carried it on, stamping the same quality of iron "H. & Co.," with a crown. One Balls called on the plaintiff's agent, was informed that all iron was now so stamped, and communicated this to the defendant, who subsequently contracted to buy of the plaintiff 67 tons "S. & H. (crown) common bars;" the iron stamped "H. & Co. (crown)" was shipped and arrived at Hull, where the defendant, finding it rusty, declined to accept it, alleging that it was not stamped according to contract. The jury found that the "S. & H." was not material. The plaintiff obtained a verdict. On the motion the Court refused to disturb the verdict. Erle, C. J., said, "I think "it is not a contract for iron of a particular brand, but for iron of "a known quality, and that the plaintiff tendered the article for "which the defendant contracted."

In *Rylands* v. *Kreitman* (*c*), in 1865, the contract was to deliver

(*b*) *Hopkins* v. *Hitchcock*, 14 C. B. N. S. 65; 32 L. J. C. P. 154.
(*c*) *Rylands* v. *Kreitman*, 19 C. B. N. S. 351.

500 piculs of cotton in the month of June. The plaintiffs tendered 287 bales by one ship and 20 bales by another. The defendants refused them, and the matter was referred to arbitrators, who found that the 287 bales and 5 out of the 20 bales were not in a merchantable condition. It was proved that in contracts like this, the seller might deliver in several quantities. The jury found that the plaintiffs were at no time in the month of June able to deliver more [*212] than 15 bales. The Court sustained the *verdict for the defendant. The report is not a very full one, but it would appear that if the plaintiffs had during the month of June, while there was still time to tender the rest, tendered the 15 merchantable bales, separated from the 5 unmerchantable ones, the result might have been different.

In *Morgan* v. *Gath* (*d*), in 1865, the contract was to deliver cotton in a merchantable condition, "the damaged, if any, to be rejected, provided it cannot be made merchantable." It was held that at all events the bulk must be in a merchantable condition when tendered, and that it was not sufficient that it might be made merchantable.

In *Nicholson* v. *Bradfield Union* (*e*), in 1866, the defendants had ordered 70 tons of Ruabon coals. The plaintiff delivered one parcel of 15 tons of Ruabon coals, and the next day a parcel of 7 tons which were not Ruabon coals. He shot the second parcel on to the first. About 6 tons were consumed before the inferiority was discovered. The Court held that the defendants could not be called upon to pay for the unconsumed remainder.

Azémar v. *Casella* (*f*), in 1867, was an action against the purchasers for not accepting certain cotton. The facts as appearing in a special case were that De Souza and Co. of Madras, had consigned to the plaintiff 128 bales of cotton marked $\frac{D.C.}{C.}$, sending a sample at the same time, but by overland route. The sample was "Long Staple Salem" cotton, and was handed by the plaintiffs to the broker. The defendants examined the sample, and purchased the cotton, the broker's note being in the following terms: "Sold by order and for account of Messrs. J. C. Azémar & Co. to Messrs. A. Casella & Co. the following cotton, viz., $\frac{D.C.}{C.}$ 128 bales at 25*d.* per lb., expected to arrive in London, per 'Cheviot,' from Madras. The cotton guaranteed equal to sealed sample in our possession. Should the quality prove inferior to the guarantee, a fair allowance [*213] to be made." The *cotton turned out to be a particularly good sample of Western Madras, and not Long Staple Salem, and was therefore not in accordance with the sample, and the defendants rejected it. It was proved that these two cottons re-

(*d*) *Morgan* v. *Gath*, 3 H. & C. 748; 34 L. J. Ex. 165.

(*e*) *Nicholson* v. *Bradfield Union*, L. R. 1 Q. B. 620; 35 L. J. Q. B. 176; 7 B. & S. 747.

(*f*) *Azemar* v. *Casella*, L. R. 2 C. P. 431; L. R. 2 C. P. 677; 36 L. J. C. P. 124; 36 L. J. C. P. 263.

quire different machinery in their manufacture. It was contended for the plaintiff that this was a sale of specific bales of cotton, with a warranty superadded that it should be equal in quality to the sample, and that it was not a sale subject to a condition that the cotton should be Long Staple Salem. But Wiles, J., in delivering judgment for the defendants, said the property had not passed to them, and held that this was not a mere difference in value to be compensated for under the allowance clause, but an essential difference in the species, so that the contract was for one thing, and the article tendered another. And this judgment was affirmed by Martin, B., Blackburn, J., Channell & Piggott, B. B., and Shee, J., in the Exchequer Chamber (*g*).

In *Smith* v. *Hughes* (*h*), in 1871, the plaintiff offered to sell to the defendant 16 qrs. of oats, showing him a sample of them. There was a conflict of evidence as to what had taken place at the sale, the defendant saying that the plaintiff had offered old oats, the plaintiff denying that the word "old" had been used. The plaintiff delivered the oats, and when the defendant discovered they were new, he requested the plaintiff to take them back again, which he declined to do. The plaintiff then brought this action for the price. There were two questions to be decided in this case; the first was whether the word "old" had been used, for if so it was a condition precedent to the vendee's obligation to receive the oats, that they should be old; and the second question was whether there was any contract at all. On this point the case has already been noticed.

In *Heilbutt* v. *Hickson* (*i*), in 1872, there was a sale by sample, —the sample itself containing a hidden defect. The *plain- [*214] tiffs in London had contracted to purchase 30,000 pairs of shoes equal to sample from the defendants in Northampton for the use of the French army. The defendants delivered parcels of shoes at Fenning's Wharf in London, and on cutting some of them open, it was found that some contained paper in the soles. The defendants then wrote a letter to the plaintiff, agreeing to take back those shoes which should be rejected in consequence of their containing paper. The defendants then delivered other parcels, making in all 12,825 pairs, which were inspected by the plaintiffs and paid for, and 12,-225 of these were then sent over to Lille, where they were rejected by the French Government, as they were found to contain paper fillings in the soles. The plaintiffs then declined to receive any more shoes, and requested the defendants to take the shoes already delivered and to return the purchase-money. The defendants offered to take back all those which contained paper, but this could only be ascertained by cutting them open. The sample shoe was cut open, and it was found to contain paper in the sole. At the

(*g*) *Azemar* v. *Casella*, L. R. 2 C. P. 431 and 677; 36 L. J. C. P. 124 and 263.
(*h*) *Smith* v. *Hughes*, L. R. 6 Q. B. 597; 40 L. J. Q. B. 221.
(*i*) *Heilbutt* v. *Hickson*, 7 C. P. 438; 41 L. J. C. P. 228.

trial the jury found that both the shoes delivered, and those ready for delivery, were not equal to sample, and that the defects could not have been discovered by any inspection which ought reasonably to have been made by the plaintiffs. The defendants contended that the plaintiffs had accepted the shoes, and could not now return them, and that the plaintiffs' remedy was damages for breach of warranty. But the Court, consisting of Bovill, C. J., Byles and Brett, JJ., held that the plaintiffs were entitled to recover the loss of profit on the whole 30,000 pairs which would have accrued to them if the shoes has been accepted by the French Government, as well as the price already paid to the defendants, and that the plaintiffs were entitled to throw back on the defendants' hands, the whole of the shoes at Lille as well as those which had been delivered at Fenning's Wharf and not forwarded to Lille. Referring to the alleged acceptance of the shoes by the plaintiffs after the inspection in London, Brett, J., said: "The defect, though known to "the defendants' servants, was a secret defect, not discoverable by [*215] "any reasonable exercise *of care or skill on an inspection "in London. By the necessary inefficacy of the inspection in Lon-"don—an inefficacy caused by this kind of fault, viz., a secret de-"fect of manufacture which the defendants' servants committed—"the apparent inspection in London could be of no more practical "effect than no inspection at all . . . . the real inspection at Lille "being by the acts of the defendants' servants the first possibly ef-"fective inspection, it seems to me that such inspection was, by the "acts of the persons for whose acts the defendants were responsible, "substituted for the first inspection stipulated for by the contract" (*k*).

As to Quantity.

In *Waddington* v. *Oliver* (*l*), in 1805, the plaintiff agreed to sell the defendant 100 bags of hops, to be delivered on or before the 1st of January, as might be agreeable to the plaintiff. He delivered twelve bags on the 12th of December, and demanded payment, and was refused, and commenced his action on the following day. The Court upheld the nonsuit, being of opinion that he could not demand the price until he had delivered the whole.

In *Cross* v. *Eglin* (*m*), in 1831, the contract was for 300 qrs. of rye "more or less." The vendor tendered 345 qrs., and the Court held that was more than was meant by "more or less."

In *Cunliffe* v. *Harrison* (*n*), in 1851, the defendants, wine merchants at Liverpool, had ordered ten hogsheads of claret from the plaintiff, a wine merchant at Bordeaux. The plaintiff sent fifteen

(*k*) For a sale of goods "with all faults," see *Ward* v. *Hobbs*, 4 Ap. Ca. 13.
(*l*) *Waddington* v. *Oliver*, 2 B. & P., N. R. 61.
(*m*) *Cross* v. *Eglin*, 2 B. & Ad. 106.
(*n*) *Cunliffe* v. *Harrison*, 6 Ex. 903; 20 L. J. Ex. 325.

hogsheads, and the defendants then wrote that they had ordered ten and would take that number only, provided they proved satisfactory. They subsequently tasted the claret and disapproved of it, and after some months' *delay gave notice to the [*216] plaintiff that they would not accept any of the wine. The Court on the motion ordered a nonsuit to be entered, Parke, B., saying, "If ten only had been delivered, and they (the defendants) had "forborne to take any objection for three or four months, that "would have been sufficient evidence that they approved of the "quality of the wine. * * * But the delivery of fifteen hogs-"heads, under a contract to deliver ten, is no performance of that "contract, for the person to whom they are sent cannot tell which "are the ten that are to be his * * * The delivery of more "than ten is a proposal for a new contract."

In the note there are several cases similar to *Cunliffe* v. *Harrison* (*o*).

In *Moore* v. *Campbell* (*p*), in 1854, the defendant had contracted to sell to the plaintiff 100 tons of hemp, part of which was to arrive by the "George Green." The hemp was warehoused, and delivery orders were signed by the warehousemen for "about" fifty-two tons. The plaintiff refused to take the delivery orders in that form. The defendant resold the hemp. The Court held that evidence to show that the usage among brokers was to give delivery orders in this form should have been admitted (*q*).

In *Bourne* v. *Seymour* (*r*), in 1855, the defendant contracted to sell to the plaintiff "about 500 tons of nitrate of soda." The contract contained this clause, "It is understood that the *above [*217] "nitrate of soda is to form the full and complete cargo of the "'John Phillips,' 345 tons register," and a clause that if the 'John Phillips,' could not be made available from any cause, then the defendant was to deliver "another cargo or cargoes of about equal quantity." The defendant delivered a full cargo by the 'John Phillips,' but it fell considerably short of 500 tons. The Court

(*o*) *Cunliffe* v. *Harrison*, 6 Ex. 903; 20 L. J. Ex. 325; *Hart* v. *Mills*, in 1846, 15 M. & W. 85; 15 L. J. Ex. 200; *Richardson* v. *Dunn*, in 1841. 2 Q. B. 218; *Dixon* v. *Fletcher*, in 1837, 3 M. & W. 146; *Oxendale* v. *Wetherell*, in 1829, 9 B. & C. 386; *Rylands* v. *Kreitman*, 19 C. B. N. S. 351.

(*p*) *Moore* v. *Campbell*, 10 Ex. 323; 23 L. J. Ex. 310.

(*q*) [In *Gwillim* v. *Daniel*, 2 C. M. & R. 61, the word "say" was construed as "which we estimate at."

In *Leeming* v. *Snaith*, in 1851, 16 Q. B. 275; 20 L. J. Q. B. 164; the words "say not less than" were held to be not mere words of expectation showing what the parties supposed the quantity would prove to be, but amounted to a contract to deliver at least that quantity. In *McConnell* v. *Murphy*, in 1873, L. R. 5 P. C. 203, the words "say about" were held to be words indicating that the amount was expected to be, not warranted to be, a certain amount. In *Morris* v. *Levison*, in 1876, 1 C. P. D. 155; 45 L. J. C. P. 409, "say about 1,100 tons" were held not to be words of expectation, but a contract to deliver that amount.]

(*r*) *Bourne* v. *Seymour*, 16 C. B. 337; 24 L. J. C. P. 202.

held that the plaintiff was entitled to recover, for that this was an absolute contract to deliver 500 tons, and was not conditional on the vessel named holding that quantity (*s*).

In *Gorissen* v. *Perrin* (*t*), in 1857, the defendant tendered bales of gambier which were only of about one-third of the weight of what were known in the market as bales.

In *Hoare* v. *Rennie*, (*u*), in 1859, which was an action for not accepting, the plaintiffs contracted in April to deliver to the defendants 667 ton of Swedish iron to be shipped from Sweden in about equal quantities in each of the months of June, July, August, and September. In the month of June the plaintiffs shipped only about 21 tons. The defendants declined to accept the 21 tons, and refused to receive the residue of the iron. The defendants demurred, and in delivering judgment for them, Pollock, C. B., said, "The only question we have to deal with is whether, on a contract "like this, if the sellers at the outset send a less quantity than they "are bound to send, so as to begin with a breach, they can compel "the purchasers to accept and pay for the sending of which was a "breach and not a performance of the agreement," * * * and after referring to what might possibly have been the case if the defendants had received a portion and then refused the remainder, continued, "Where parties have made an agreement for themselves, "the Courts ought not to make another for them. Here they say "that one-fourth shall be shipped in each month, and we cannot [*218] "say that they meant to *accept any other quantity. At "the outset the plaintiffs failed to tender the quantity according to "the contract: they tendered a much less quantity. The defendants "had a right to say that this was no performance of the contract; "and they were no more bound to accept the short quantity than if "a single delivery had been contracted for." Watson and Channell, BB., were of the same opinion. It is very doubtful, however, whether this can be considered good law now, notwithstanding the remarks of Bramwell, L. J., in delivering his judgment in *Honck* v. *Muller* (*x*), where he said it had been supposed that *Hoare* v. *Rennie* (*y*) had been overruled by *Simpson* v. *Crippin* (*z*), but that it was not so.

In the case of *Tamvaco* v. *Lucas* (*a*), in 1859, the defendants were brokers *del credere*, and contracted for their principal, Dart, to purchase from the plaintiff a cargo of "about 2,000 qrs., say from 1,800 to 2,200 qrs." of wheat, "sellers guarantee delivery of invoice weight; buyers to pay for any excess of weight, unles it be the result of sea damage or heating," payment cash in exchange for the usual shipping documents. The bill of lading was for 2215 qrs.,

(*s*) See also *Morris* v. *Levison*, 1 C. P. D. 155; 45 L. J. C. P. 409.
(*t*) *Gorissen* v. *Perrin*, 2 C. B. N. S. 681; 27 L. J. C. P. 29.
(*u*) *Hoare* v. *Rennie*, 5 H. & N. 19; 29 L. J. Ex. 73.
(*x*) *Honck* v. *Muller*, 7 Q. B. D. 100; 50 L. J. Q. B. 529.
(*y*) *Hoare* v. *Rennie*, 5 H. & N. 19; 29 L. J. Ex. 73.
(*z*) *Simpson* v. *Crippin*, L. R. 8 Q. B. 14; 42 L. J. Q. B. 28.
(*a*) *Tamvaco* v. *Lucas*, 1 E. & E. 581; 28 L. J. Q. B. 150.

and Dart refused to accept it. The invoice was for an amount not exceeding 2,200 qrs. The declaration stated that the plaintiffs were ready to deliver the shipping documents in exchange for the invoice price, so that the defendants were not to be charged more than they had contracted to pay. The Court held that if there had actually been 2,215 qrs. on board, Dart would have been justified in refusing to accept, and so if the usual shipping documents represented the cargo to be more than 2,200 qrs., Dart might refuse to accept, and could not be made liable by proof that in fact the cargo was not more than 2,200 qrs. The words of the contract, "Buyers to pay for any excess of weigh," most probably referred to any actual excess over *the invoice weight, and are consistent with the [*219] rest of the contract, that the quantity was not to exceed 2,000 qrs.

In a second case of *Tamvaco* v. *Lucas* (*b*) in 1859, the contract was the same as in the first case. The shipping documents showed on the face of them, a quantity within the prescribed limits, but the amount actually shipped was below, and it was held that the purchaser was not bound to accept.

In *Simpson* v. *Crippin* (*c*), in 1872, the purchasers brought an action for damages against the vendors for not delivering coal. The contract dated 10th June, was to purchase about 6,000 to 8,000 tons of coal, delivery to commence on first July in about equal monthly instalments over the next twelve months, into the purchaser's wagons at the vendor's collieries. On the 8th July the defendants complained that no wagons had been sent; this was followed by further complaints, and eventually only 158 tons were taken during that month. On the 1st of August the defendants wrote to cancel the contract, saying that their sole inducement to contract was the regular and punctual withdrawal by the plaintiffs of the stipulated quantity during the summer months. Blackburn and Lush, JJ., held that the defendants were not entitled to cancel the contract; Mellor, J., was of the opposite opinion, holding that the case was governed by *Hoare* v. *Rennie* (*d*).

These cases of conditions precedent as to quantity may be contrasted with the case of *Covas* v. *Bingham* (*e*), where the contract was to buy a specific cargo believed to consist of a certain amount, whatever the amount might turn out to be in fact. And with the case of *Johnston* v. *Kershaw* (*f*) and that class of cases, in which the defendant was held bound to accept a different quantity to that mentioned in the contract, on the ground that the plaintiff was the purchaser's agent, and in *consigning a different quantity was acting [*220] within the scope of his instructions.

In *Johnston* v. *Kershaw* (*g*), in 1867, there was an order from a

(*b*) *Tamvaco* v. *Lucas*, 1 E. & E. 592; 28 L. J. Q. B. 301.
(*c*) *Simpson* v. *Crippin*, L. R. 8 Q. B. 14; 42 L. J. Q. B. 28.
(*d*) *Hoare* v. *Rennie*, 5 H. & N. 19; 29 L. J. Ex. 73.
(*e*) *Covas* v. *Bingham*, 2 E. & B. 386; 23 L. J. Q. B. 26.
(*f*) *Johnston* v. *Kershaw*, L. R. 2 Ex. 82; 36 L. J. Ex. 44.
(*g*) *Johnston* v. *Kershaw*, L. R. 2 Ex. 82; 36 L. J. Ex. 44.

Liverpool merchant to merchants at Pernambuco to purchase 100 bales of cotton and to ship them to Liverpool. The plaintiff purchased and shipped 94 bales only, and recovered their price. The Court treated the case and no doubt correctly, as one of instructions from a principal to an agent. Channel, B., said, "I am of "opinion that this order must not be taken as an order to buy 100 "specific bales of cotton at one time, but that the plaintiff by pur-"chasing 94 bales has executed it with due and reasonable diligence."

Ireland v. *Livingstone* (*h*) was also an action for not accepting. The case was first heard in the Queen's Bench in 1866, where the plaintiff obtained judgment, which was reversed in the Exchequer Chamber in 1870; and the Exchequer Chamber was reversed in the House of Lords in 1872. The defendant, who was a merchant in Liverpool, had given an order for sugar to the plaintiffs, who were commission merchants in the Mauritius, in the following terms: "My opinion is, that should the beet crop prove less than "usual, there may be a good chance of something being made by "importing cane sugar at about the limit I am going to give you "as a maximum, say 26*s.* 9*d.* for Nos. 10 and 12, and you may ship "me 500 tons, to cover cost, freight, and insurance; 50 tons more "or less of no moment, if it enables you to get a suitable vessel; "you will please to provide insurance, and draw on me for the cost "thereof as customary, attaching documents, and I engage to give "same due protection on presentation. I should prefer the option "of sending vessel to London, Liverpool, or the Clyde; but if that "is not compassable, you may ship to either Liverpool or London." When the plaintiffs received this letter prices and freights were [*221] above the limits mentioned by the *defendant, but subsequently (viz., on 22 or 23 Sept.), prices having fallen, the plaintiffs purchased from several brokers 14 distinct lots of sugar, amounting to 393 tons, and consigned them to the defendant by a ship having on board a large quantity of sugar for other consignees. The plaintiffs continued to watch the market in the Mauritius, intending to complete the purchase of the full 500 tons, but before they were able to purchase any more, the defendant countermanded the order; and on the 393 tons arriving in England, refused to accept them on the grounds that he had contracted to purchase 500 tons, 50 tons more or less, and was entitled to refuse 393, and relying on *Kreuger* v. *Blanck* (*i*), that the contract was for the purchase of a cargo of 500 tons, to be consigned in a ship which was to call for orders, whereas the plaintiffs had not sent a cargo nor in such a ship. The plaintiffs sold the sugar and brought this action for the difference. They contended that this was in fact a contract between principal and agent, and that they had a right to say, "we have "been buying under your authority 393 tons, and have appropriated

(*h*) *Ireland* v. *Livingstone*, L. R. 2 Q. B. 99; L. R. 5 Q. B. 516; 5 E. & I. Ap. 395; 36 L. J. Q. B. 50; 39 L. J. Q. B. 282; 41 L. J. Q. B. 201.

(*i*) *Kreuger* v. *Blanck*, L. R. 5 Ex. 179; 39 L. J. Ex. 160.

"them to you, and would have completed the order if you had not "stopped us;" or, as Shee, J., put it, "it was an order to purchase "up to 500 tons" (*k*); and the House of Lords sustained this view. Lord Blackburn said (*l*), "My opinion is, that when the order was "accepted by the plaintiffs there was a contract of agency by which "the plaintiffs undertook to use reasonable skill and diligence to "procure the goods ordered at or below the limit given, to be fol-"lowed up by a transfer of the property at the actual cost, with the "addition of the commission; but that this superadded sale is not "in any way inconsistent with the contract of agency existing be-"tween the parties, by virtue of which the plaintiffs were under "the obligation to make reasonable exertions to procure the goods "ordered as much below the limit as they could" (*m*). This case may be contrasted *with *Ex parte White, in re Nevill* (*n*), [*222] where the contention was that a consignee was an agent, when in fact he was a principal.

In *Reuter* v. *Sala* (*o*), in 1879, the action was to recover damages for the non-acceptance of 25 tons (more or less) of Penang pepper, October $\frac{\text{and}}{\text{or}}$ November shipment from Penang to London. The name of the vessel, marks, and full particulars to be declared to the buyer within 60 days from date of bill of lading. On the 19th of January the plaintiffs declared 25 tons, of which 20 only were of November shipment, and the defendants declined to accept, on the ground that it was not the full quantity of November shipment. Subsequently, on the 5th of February, the plaintiffs again declared the 20 tons, together with 5 more tons, all of November shipment, but as to these 5 tons the tender was more than 60 days from the date of the bill of lading, and the defendants again refused to take the pepper. The question was, whether the plaintiffs could maintain the action in respect of the 20 tons. Lord Coleridge, C.J., who tried the case without a jury, directed judgment to be entered for the defendant. On appeal, Thesiger and Cotton, L.JJ., were of opinion they could not; Thesiger, L.J., saying, "The subject of the "contract is the sale of a specific quantity of a given article, with "a margin for a moderate excess in or diminution of that quantity "under the words 'about' and 'more or less.' The rule applicable "to such a contract, if it were not qualified by other provisions, "would be that, subject to the moderate margin, the sellers cannot "call upon the buyers to accept any greater or less quantity of the "article bargained for than the specified quantity. In the present "case, if the 5 tons shipped or declared too late, be excluded, the "diminution in quantity is clearly beyond the margin." Brett,

(*k*) L. R. 2 Q. B. 107.

(*l*) L. R. 5 E. & I. Ap. 409; 41 L. J. Q. B. 205.

(*m*) [In delivering judgment in this case, Lord Blackburn showed, with great clearness, the position of an agent consigning to a principal at a price to cover cost, freight, and insurance, 5 E. & I. Ap. 406; 41 L. J. Q. B. 204.]

(*n*) *Ex parte White, In re Nevill*, in 1870, 6 Ch. Ap. 397; 40 L. J. Bank. 73.

(*o*) *Reuter* v. *Sala*, 4 C. P. D. 239; 48 L. J. C. P. 492.

L.J., differed, being of opinion that the plaintiffs were entitled to [*223] recover in respect of the 20 *tons, leaving the defendants to a cross action in respect of the 5 tons.

In the case of *Englehart* v. *Bosanquet* (*p*), it was held that, on a sale of 2,000 tons of sugar to come in two ships, when the sugar by the first ship was not equal to contract, the buyer was not bound to take the other.

In *Kreuger* v. *Blanck* (*q*), in 1870, the order was for a "small cargo," "in all about 60 cubic fathoms," of lath-wood. The plaintiffs shipped 83 fathoms on board the 'Scandia' for Gloucester, where their agent unloaded her and set apart 60 cubic fathoms for the defendant, who declined to accept them, on the ground that he had contracted for a cargo and not for a portion of one. Kelly, C. B., and Cleasby, B., delivered judgment for the defendant; but Martin, B., was of opinion that the defendant was not more entitled to refuse the timber tendered because other timber came with it than he would have been if the cargo had consisted in part of sugar or cotton. Blackburn, J., while delivering judgment in *Ireland* v. *Livingstone* (*r*), cast some doubt on this case.

Borrowman v. *Drayton* (*s*), in 1876, was an action for not accepting, very similar to *Kreuger* v. *Blanck* (*t*). The plaintiffs contracted to sell to the defendant a cargo of from 2,500 to 3,000 barrels of petroleum. They shipped 3,000 barrels, but as this was not a full cargo, they put 300 more barrels on board, marking them so that they could be distinguished from the 3,000, and made out separate bills of lading for the two quantities. The Exchequer Court, consisting of Kelly, C. B., Cleasby and Amphlett, BB., decided that the defendant was not bound to accept, and their judgment was affirmed in the Court of Appeal by Cockburn, C.J., James and Mellish, L.JJ., and Baggallay, J.A.; Mellish, L.J., said, "We think [*224] "that effect must be given to the term 'cargo,' as *distin-"guished from the specified quantity, as, if the parties had intended "otherwise, it would have been enough to specify the quantity without introducing the term 'cargo' at all" (*u*).

As to Time.

In *Alweyn* v. *Prior* (*x*), at Nisi Prius, 1826, the contract was for the sale of "all the Gallipoli oil on board the 'Thomas' * * * "on arrival in Great Britain: to be delivered with all convenient

(*p*) *Englehart* v. *Bosanquet*, not reported, but mentioned by Bramwell, L. J., in *Houck* v. *Muller*, 7 Q. B. D. 100; 50 L. J. Q. B. 529.
(*q*) *Kreuger* v. *Blanck*, L. R. 5 Ex. 179; 39 L. J. Ex. 160.
(*r*) *Ireland* v. *Livingstone*, 5 E. & I. App. 410; 41 L. J. Q. B. 206.
(*s*) *Borrowman* v. *Drayton*, 2 Ex. D. 15; 47 L. J. Ex. 273.
(*t*) *Kreuger* v. *Blanck*, L. R. 5 Ex. 179; 39 L. J. Ex. 160.
(*u*) *Cuthbert* v. *Cumming*, in 1855, 10 Ex. 809; 11 Ex. 405; 24 L. J. Ex. 198; 24 L. J. Ex. 310.
(*x*) *Alweyn* v. *Prior*, Ry. & M. 406.

"speed, but not to exceed the 30th day of June next, &c." The vessel did not arrive till the 4th of July. The oil was tendered, but the purchaser refused to accept it; and Abbott, C.J., held that he was justified.

In *Busk* v. *Spence* (*y*), at Nisi Prius, in 1815, the contract for the sale of flax stated that "the flax shall be dispatched from St. "Petersburgh not later than the 31st July * * * and as soon "as he (the seller) knows the name of the vessel in which the flax "will be shipped, he is to mention it to the buyer." The flax was brought from St. Petersburgh in lighters and put on board before the end of July, but the ship did not sail until the 4th of September. The seller received the advice on the 12th of September in London, but did not communicate it to the defendant at Hull until the 20th. The defendant declined to accept the flax. Gibbs, C.J., was of opinion that the flax had been despatched in due time, but that the stipulation as to mentioning the name was a condition precedent, and that it had not been complied with (*z*).

In *Barber* v. *Taylor* (*a*), in 1839, the contract was for 150 *bales of cotton payment being provided for in these terms, [*225] "Upon * * * forwarding a bill of lading, I will accept your draft at sixty days' sight after the receipt of the bill of landing." The cotton was put on board the 'Romulus,' and the bill of lading was sent by the same ship, which arrived on the 21st of April. On the 24th, the plaintiff told the defendant that Messrs. Wilson had the bill of lading in their possession, and would not give it up unless the defendant got a banker's guarantee of his acceptance, or paid cash, or pledged the cotton with a broker to secure payment. The defendant declined these terms, and on the 25th he offered to accept the draft if the bill of lading were handed to him. It was not handed to him, and he declared the contract was at an end. On the 3rd of May the plaintiff tendered the bill of lading with the draft, but the defendant refused to receive it or to accept the draft, on the ground that it had not been tendered within a reasonable time after delivery. Parke, B., pointed out that it might be material to the purchaser to have it delivered as soon as possible after its arrival, so that he might go into the market and sell, and the Court held that he was not obliged to receive it after the delay (*b*).

In *Startup* v. *Macdonald* (*c*), in 1843, the contract was to sell and deliver 10 tons of oil "within the last 14 days of March;" the plaintiff tendered it at half-past eight on the evening of the last day of March. It was found that the tender had been made in time to give the defendant full oppurtunity to weigh, examine, and receive

(*y*) *Busk* v. *Spence*, 4 Camp. 329.

(*z*) See *Graves* v. *Legg*, *post*, p. 227, 9 Ex. 709; 2 H. & N. 210; 26 L. J. Ex. 316; and *Reuter* v. *Sala ante*, p. 222, 4 C. P. D. 239; 48 L. J. C. P. 492.

(*a*) *Barber* v. *Taylor*, 5 M. & W. 527.

[(*b*) Parol evidence may be given to show what is a reasonable time, *Ellis* v. *Thompson*, in 1833, 3 M. & W. 445.]

(*c*) *Startup* v. *Macdonald*, 6 M. & G. 593; 12 L. J. Ex. 487.

the oil, but the defendant who was present declined to receive it on the ground that the tender had been made at an unreasonable time, and it was held by Rolfe, Gurney, Alderson, and Parke, B B., and Williamson and Patteson, JJ., that the tender had been made in time. Lord Denman, C. J., dissenting. All the authorities were considered in this case. Parke, B., in his judgment (*d*) saying, [*226] "Where a thing is to be done *anywhere*, *a tender a convenient time before midnight is sufficient; where the thing is to be done at a *particular place*, and where the law implies a duty on the party to whom the thing is to be done to attend, that attendance is to be by daylight, and a convenient time before sunset."

In *Duncan* v. *Topham* (*e*), in 1849, the defendant had on the 19th of February offered to take certain linseed cakes if put on board "directly." The plaintiff accepted the offer on the 22nd, saying he would ship them "to-morrow," and shipped them on the 26th. The defendant declined to accept. The plaintiff in his declaration, set out the contract wrongly, but Cresswell, J., intimated that if he had stated it correctly, the verdict would have been against him (*f*).

In *Spartali* v. *Benecke* (*g*), in 1850, the contract was for goats' wool, "to be paid for by cash in one month." Two days after the contract, when the defendants demanded the wool, the plaintiffs refused to deliver it unless paid for. The defendants declined to pay then, and refused to take the wool after the expiration of a month. The Court was of opinion that the purchasers were entitled to call for the delivery of the goods at any reasonable time within the month, without tendering the price.

In *Staunton* v. *Wood* (*h*), in 1851, the contract was to deliver cable bars forthwith, payment in cash in fourteen days from the date of the contract. The Court was of opinion that the contract was to deliver within the fourteen days, and that delivery was a condition precedent to the right to sue.

And a contract to supply goods "as soon as possible" means no more than within a reasonable time, regard being had to the vendor's facilities and extent of business, and to the contracts he already had in hand (*i*).

[*227] **Graves* v. *Legg* (*k*), in 1854, was an action for not accepting 300 bales of wool which were to be shipped from Odessa, and the names of the vessels to be declared as soon as the wools were shipped.

(*d*) 6 M. & G. 625; 12 L. J. Ex. 483.

(*e*) *Duncan* v. *Topham*, 8 C. B. 225; 18 L. J. C. P. 310.

(*f*) [For the meaning of the words "immediately" and "forthwith," see *Toms* v. *Wilson*, in 1862, 4 B. & S. 442; 32 L. J. Q. B. 382; and *Roberts* v. *Brett*, in 1865, 11 H. L. R. 337; 34 L. J. C. P. 337.]

(*g*) *Spartali* v *Benecke*, 10 C. B. 212; 19 L. J. C. P. 493.

(*h*) *Staunton* v. *Wood*, 16 Q. B. 638; 15 Jur. 1123.

(*i*) *Per* Cresswell, J., in *Attwood* v. *Emery*, in 1856, 1 C. B. N. S. 115; 26 L. J. C. P. 73. See also *Hydraulic Engineering Co.*, v. *McHaffie*, 4 Q. B. D. 670.

(*k*) *Graves* v. *Legg*, 9 Ex. 709; 23 L. S. Ex. 228. The two reports differ as to who delivered judgment.

The defendant pleaded that the names had not been declared, and it was held on demurrer that this was a condition precedent which had not been performed. This case was again heard (*l*) in 1856, when it was proved that both the plaintiff and the defendant employed the same brokers, and that the plaintiff had given notice to the brokers as soon as the wool was shipped, but that the brokers had not given notice to the defendants until some time afterwards. The Court held that the notice which was admitted to have been given according to custom was sufficient. This judgment was affirmed in the Exechequer Chamber (*m*).

In *Coddington* v. *Paleologo* (*n*), in 1867, the plaintiffs contracted to sell to the defendants 900 pieces of cloth, "delivering on April 17; complete 8 May." They delivered no goods on the 17th, and the next day the defendants wrote saying they rescinded the contract. The plaintiffs declined to allow it to be rescinded, and tendered the whole of the 900 pieces before the 8th of May. The Court was equally divided, Kelly, C. B., and Pigott, B., holding that the seller was not bound to deliver any portion of the goods on the 17th; Martin and Bramwell, BB., holding that he was bound.

Alexander v. *Vanderzee* (*o*), in 1872, was another action for not accepting a large quantity of Danubian maize which the plaintiff had contracted to sell to the defendant "for shipment in June and (or) July." Two cargoes were tendered, for which the bills of lading were dated respectively the 4th and 6th of June. It appeared that the loading of the two cargoes began one on the 12th and the other on the 16th of May, and were completed on the 4th and 6th of June, more *than half of each cargo having been [*228] put on board in May. The jury found that these were June shipments. Martin, B., Blackburn, Mellor, and Lush, JJ., thought that the question whether or not they were June shipments had been properly left to the jury, and that the defendant was not justified in rejecting the maize. Kelly, C. B., doubted whether it was for the jury to say what was meant by June shipments (*p*).

In the case of *Brandt* v. *Lawrence* (*q*), in 1876, the plaintiff had entered into two distinct and separate contracts in January, by each of which he contracted to sell to the defendant 4500 qrs. of oats, 10 per cent. more or less, "shipment by steamer or steamers" during a time agreed upon. The plaintiff shipped 5650 qrs. on board the 'Winstead,' and tendered them to the defendant, as to 4511 in fulfilment of the first contract and as to 1139 in part fulfilment of the second, and the defendant refused to accept them on the ground that the shipment had not been made within the time

(*l*) *Graves* v. *Legg*, 11 Ex. 642.
(*m*) *Graves* v. *Legg*, 2 H. & N. 210; 26 L. J. Ex. 316.
(*n*) *Coddington* v. *Paleologo*, L. R. 2 Ex 193; 36 L. J. Ex. 73.
(*o*) *Alexander* v. *Vanderzee*, L. R. 7 C. P. 530.
(*p*) *Ashforth* v. *Redford*, L. R. 9 C. P. 20.
(*q*) *Brandt* v. *Lawrence*, 1 Q. B. D. 344; 46 L. J. Q. B. 237.

agreed upon. Subsequently the plaintiff shipped the remaining quantity of oats on board the 'Oxford.' These also the defendant declined to accept on the same grounds. The jury found that the shipment by the 'Winstead' had been made in time, but that by the 'Oxford' was too late. Lord Coleridge, C.J., held that the defendant was bound to accept the whole of the oats by the 'Winstead.' A new trial was refused by Blackburn and Quain, JJ., and they were affirmed by Mellish, James, and Baggallay, L.JJ. Mellish, L.J., in the course of the argument, said, "I think the legal "inference is, that it was intended that the shipment should be "made in different parcels, and that the purchaser was bound to "accept them as they came if they were in time, he was not en-"titled to wait in order to see whether the whole was in time." This case was referred to by Thesiger, L.J., in his judgment in *Reuter* v. *Sala* (*r*), where he said, speaking of the refusal to take [*229] all the oats on the 'Winstead,' "At the time of this *refusal "the sellers were acting in strict accordance with their contract, and "there was nothing to indicate that the contract would not be per-"formed by them in its entirety."

In the case of *Bowes* v. *Shand* (*s*), in the House of Lords in 1877, the appellant, the purchaser, in March had agreed to purchase rice from Shand by a contract in the following terms :—"To be shipped at Madras or Coast * * * during the months of March $\frac{\text{and}}{\text{or}}$ April, 1874, about 300 tons, per 'Rajah of Cochin.'" There was also a further contract for 300 tons dated the 24th of March in the same words. The 600 tons filled 8200 bags, and bills of lading were signed for them as follows : for 1780 bags, bill signed 23rd February : for 1780 bags, bill signed 24th February : for 3500 bags, bill signed 28th February : and for the remaining 1080 bags, bill signed 3rd March. But of these 1080 bags it turned out that all but 50 were put on board on the 28th of February, and those 50 on the 3rd of March. The defendants declined to accept any of the rice, on the ground that it was not shipped during the months of March $\frac{\text{and}}{\text{or}}$ April, and the House of Lords held that they were entitled to do so. On the motion to enter judgment for the defendants, Blackburn, J., said, "That if the loading of all four parcels "had commenced in February, and been completed and bills of "lading signed in March, the case would have been identical with "*Alexander* v. *Vanderzee* (*t*), and then it would have been a ques-"tion for the jury whether this was a shipment in March $\frac{\text{and}}{\text{or}}$ April. "But that it was unnecessary to decide that in this case, because "the three earlier parcels were, in every sense of the word, com-"pletely shipped in February, and it was unnecessary to consider "whether the last shipment was according to contract, for the de-

(*r*) *Reuter* v. *Sala*, 4 C. P. D. 245 ; 48 L. J. C. P. 497.

(*s*) *Bowes* v. *Shand*, 1 Q. B. D. 470; 45 L. J. Q. B. 507; 2 Q. B. D. 112; 46 L. J. Q. B. 201; 2 App. Ca. 455; 46 L. J. Q. B. 561.

(*t*) *Alexander* v. *Vanderzee*, 7 C. P. 530, *ante*, p. 227.

"fendants, who bargained to have 600 tons shipped in March, were "not bound to accept 4 tons shipped in March, and 596 shipped in "February." *This judgment was reversed in the Court of [*230] Appeal (*u*), but restored in the House of Lords (*x*).

And in *Reuter* v. *Sala* (*y*), in 1879, the contract was to deliver 25 tons of pepper of October $\frac{\text{and}}{\text{or}}$ November shipment, name of vessel and full particulars to be declared to buyer within 60 days of the bill of lading. Only 20 tons were declared within the 60 days, but subsequently 5 more tons were declared. It was held that the purchaser was not bound to accept.

The word "month" means a lunar month in legal matters, but in commercial matters it always means a calendar month, unless the context shows differently (*z*). In Acts of Parliament it means a calendar month, unless words are added showing a lunar month to be meant (*a*). And where the contract is for the sale of goods to be paid for in two months, the time must be calculated exclusively of the day on which the contract was made, so that the vendee may have two entire calendar months in which to make payment (*b*).

As to Arrival and Delivery.

Unless there are express terms to the contrary, if the goods perish without any fault on the part of the vendor, he is relieved from his obligation to deliver (*c*), and the vendee's obligation still remains binding on him to pay for the goods *if the property [*231] in them had passed to him at the time when they were destroyed.

In the following cases the question was, whether the arrival of the goods was a condition precedent.

In *Boyd* v. *Siffkin* (*d*), at Nisi Prius in 1809, the sold note was in the following terms:—"Sold for Mr. H. Siffkin to Mr. Boyd, about 32 tons more or less of Riga Rhine hemp, on arrival per 'Fanny and Almira.'" The vessel arrived with no hemp on board. The purchaser brought this action for not delivering. Lord Ellenborough was of opinion that the words bought and sold in the notes meant contracted to buy and sell, on arrival of the hemp, not of the ship, and nonsuited the plaintiff.

(*u*) 2 Q. B. D. 112; 46 L. J. Q. B. 201.
(*x*) 2 App. Ca. 455; 46 L. J. Q. B. 561.
(*y*) *Reuter* v. *Sala*, 4 C. P. D. 239; 48 L. J. C. P. 429, *ante*, p. 222.
(*z*) *Per* Pollock, C. B., in *Hart* v. *Middleton*, in 1845, 2 Car. & Kir. 10.
(*a*) 13 & 14 Vict. c. 21, s. 4.
(*b*) *Webb* v. *Fairmaner*, 1838, 3 M. & W. 473.
(*c*) For the law on this subject, see the Principles of Contract, by F. Pollock, 3rd ed., p. 376—Impossible agreements: And *Paradine* v. *Jane*, Aleyn, 26; *Taylor* v. *Caldwell*, 3 B. & S. 826; 32 L. J. Q. B. 164; *Appleby* v. *Myers*, L. R. 1 C. P. 615; 2 C. P. 651; 36 L. J. C. P. 331; *Bailey* v. *De Crespigny*, L. R. 4 Q. B. 180; 38 L. J. Q. B. 98; *Anglo-Egyptian Navigation Co.* v. *Rennie*, L. R. 10 C. P. 271; 44 L. J. C. P. 130; *Howell* v. *Coupland*, L. R. 9 Q. B. 462; 1 Q. B. D. 258; 43 L. J. Q. B. 201; 46 L. J. Q. B. 147; *Hills* v. *Sughrue*, 15 M. & W. 253; *Robinson* v. *Davison*, L. R. 6 Ex. 269; 40 L. J. Ex. 172; *Jackson* v. *Union Marine Insurance Co.*, 42 L. J. C. P. 284; 44 L. J. C. P. 27; L. R. S. C. P. 572.
(*d*) *Boyd* v. *Siffkin*, 2 Camp. 326.

Idle v. *Thornton* (*e*), at Nisi Prius in 1812. The contract was for 200 casks of tallow "on arrival:" "if it should not arrive on or before the 31st of December next, the bargain to be void." The vessel, with the tallow on board, was wrecked off Montrose in November; the greater part of the tallow was saved, and might have been forwarded to London by the 31st of December, but the defendants sold it at Leith. Lord Ellenborough held that the contract was conditional on the arrival of the tallow in London in the ordinary course of trade, and nonsuited the plaintiffs, the purchasers.

In *Alexander* v. *Gardner* (*f*), in 1835, the contract was to pay for butter by a bill at two months after the butter was landed. The Court held that this term was introduced to fix a date for payment, and not to make the landing a condition precedent.

In *Lovatt* v. *Hamilton* (*g*), in 1839, the vendor was sued for damages for not delivering 43 tons of oil. The contract was for "50 tons of palm oil, to arrive per 'Mansfield.' In case of non-arrival, or the vessel's not having so much in after delivery of former contracts this contract to be void." Part of the 'Mansfield's' cargo was trans- [*232] shipped to the 'Watt,' *and when the 'Mansfield' arrived, and delivery on former contracts had been made, there were only 7 tons left for the plaintiff. The Court held that the arrival of the oil in the 'Mansfield' was a condition precedent, and that the plaintiffs were not entitled to the oil transshipped on to the 'Watt.' And further, that the contract was entire, and the plaintiffs were not entitled to the 7 tons which did arrive by the 'Mansfield.'

Johnson v. *Macdonald* (*h*), in 1842, was an action against the seller for not delivering soda according to the following contract:—"100 tons of nitrate of soda, at 18*s*. per cwt., to arrive ex 'Daniel Grant,' to be taken from the quay." The 'Daniel Grant' arrived without any soda on board. The plaintiffs contended that there was a warranty that the goods should arrive, "but," said Parke, B., "the words 'to arrive' and 'on arrival' meant the same "thing, and that the word 'to' was not the same as 'shall,'" and held that the performance of the contract was conditional on a double event—the arrival of the vessel, with the cargo on board (*i*).

In *Gorrissen* v. *Perrin* (*k*), in 1857, the action was for not delivering 1170 bales of gambier stated in the contract to be "now on "passage from Singapore, and expected to arrive at London, viz., "per 'Ravenscraig' 805 bales, per 'Lady Agnes Duff' 365 bales." Both ships arrived with the specified number of packages on board

(*e*) *Idle* v. *Thornton*, 3 Camp. 274.
(*f*) *Alexander* v. *Gardner*, 1 Bing. N. C. 677.
(*g*) *Lovatt* v. *Hamilton*, 5 M. & W. 639.
(*h*) *Johnson* v. *Macdonald*, 9 M. & W. 601; 12 L. J. Ex. 99.
(*i*) [For meaning of "now on passage, expected to arrive," see *Gorrissen* v. *Perrin*, in 1857, 2 C. B. N. S. 681; 27 L. J. C. P. 29; and *Fischel* v. *Scott*, in 1854, 15 C B. 69.]
(*k*) *Gorrissen* v. *Perrin*, 2 C. B. N. S. 681; 27 L. J. C. P. 29.

consigned to the defendants, but these packages were only one-third of the weight of packages of gambier known in the trade as bales. There were also on board a number of bales sufficient to satisfy the contract and of full weight, but not consigned to the defendants. The plaintiffs firstly declined to accept the light bales, but subsequently did accept them, and brought this action against the sellers on two counts, first for breach of the warranty that *bales of the description known in the market as bales were [*233] on their passage from Singapore, and second for breach of contract to deliver bales of the description commonly known in the markets as bales. The defence was that the duty to deliver depended on a double contingency, viz., that the stipulated number of bales should arrive and should come consigned to the defendants. The case was decided on the first count and in favour of the plaintiff. The Court being of opinion that the statement that the goods were "now on passage from Singapore" amounted to a positive assurance, that the goods were then on their passage; although, if circumstances had subsequently occurred whereby the arrival of the goods had been prevented, the defendants might have been protected by the words "expected to arrive." The second count thus became immaterial, but Cockburn, C.J., delivering the judgment of the Court said, "It may well be, that if a man takes upon himself to dispose "of goods expected to arrive by a certain ship, as goods over which "he has a power of disposal, and the goods afterwards arrive not "consigned to him, he shall be precluded from saying, that, in ad-"dition to the contingency of their arrival, there was implied the "further contingency of their coming consigned to him. He has "dealt with them as his own, and cannot be allowed to import into "the contract a new condition, viz., that the goods on their arrival "shall prove to be his."

Tregelles v. *Sewell* (*l*), in 1862, was an action by the purchaser against the vendor for not delivering a balance of 20 tons. The contract was for the sale of "300 tons Old Bridge Rails, at 5*l.* 14*s.* "6*d.* per ton, delivered at Harburgh, cost, freight, and insurance; "payment by net cash in London, less freight, upon handing bill "of lading and policy of insurance." The defendant shipped the 20 tons which remained to be delivered, on board a vessel bound for Harburgh, and having insured the iron handed the bill of lading indorsed *in blank together with the policy to the [*234] plaintiffs, and received payment less freight. On the voyage the vessel met with a storm and put into a port for repairs, where the iron was seized under an execution on a bottomry bond. It was contended for the plaintiffs that this was a contract to deliver the iron at Harburgh, but the Court held, and was affirmed on appeal, that the contract was not to deliver at Harburgh, but that the iron was to be shipped for Harburgh and insured, and to be paid for at

(*l*) *Tregelles* v. *Sewell*, 7 H. & N. 574.

the rate of 5*l.* 14*s.* 6*d.* per ton, which was to include cost, insurance and freight to Harburgh.

In the case of *The Calcutta and Burmah Steam Navigation Co.* v. *De Mattos* (*m*), in 1863, there were cross-actions, in one of which the company sought to recover damages from De Mattos for not delivering coal, and to recover half the price paid in advance for the coals which he had not delivered in consequence of loss at sea, and in the other De Mattos sued for the unpaid balance. The company, wishing to have coals supplied to them at Rangoon, entered by letters into a contract with De Mattos, of London, to supply them with 1000 tons of coal, at 2*l.* 5*s.* at ton, delivered over the ship's side at Rangoon; payment to be made in cash, one-half on handing over the bill of lading and policy of insurance to cover the amount, the other half on delivery at Rangoon. De Mattos chartered the 'Waban' and put on board 1166 tons, on which he effected an insurance for 1400*l.*, and handed the policy and bills of lading to the company. The bill of lading made the coals to be deliverable to company or assigns. The invoice value of the coals was 2623*l.* 10*s.*, and the company paid De Mattos one-half of this sum, viz., 1311*l.* 15*s.* less discount. The 'Waban' sailed, and, owing to bad weather, a portion of the coals had to be thrown overboard, and on putting into the Mauritius she was deemed unseaworthy, and her cargo was discharged, and 860 tons of the coals were reshipped on board the 'Alfred Lamont.' When the 'Alfred Lamont' arrived at Rangoon her captain claimed 45*s.* a ton freight, [*235] and on the *company's agent refusing to pay it, the coals were sold by auction.

The chief questions were, whether the company were entitled to recover back the sum paid by them to De Mattos, and whether De Mattos could recover from the company the balance, viz., 1311*l.* 15*s.* of the invoice value of the coals.

Blackburn, J., in delivering (*n*) his judgment in which Mellor, J., concurred, said, "the case depended on what was the effect of "the contract as regards the property in the goods and the right to "the price, from the time of the handing over the shipping docu-"ments, and paying half of the invoice value. There is no rule of "law to prevent the parties in cases like the present from making "whatever bargain they please. If they use words in the contract "showing that they intend that the goods shall be shipped by the "person who is to supply them on the terms that when shipped "they shall be the consignee's property and at his risk, so that the "vendor shall be paid for them whether delivered at the port of "destination or not, this intention is effectual. Such is the com-"mon case where goods are ordered to be sent by a carrier to a "port of destination. The vendor's duty is in such cases at an

(*m*) *Calcutta and Burmah Steam Navigation Co.* v. *De Mattos*, 32 L. J. Q. B. 322; 33 L. J. Q. B. 214.

(*n*) 32 L. J. Q. B. 328.

"end when he has delivered the goods to the carrier, and if the "goods perish in the carrier's hands, the vendor is discharged, and "the purchaser is bound to pay him the price. See *Dunlop* v. "*Lambert* (*o*). If the parties intend that the vendor shall not "merely deliver the goods but also undertake that they shall actu-"ally be delivered at their destination, and express such intention, "this also is effectual. In such a case, if the goods perish in the "hands of the carrier, the vendor is not only not entitled to the price, "but he is liable for whatever damage may have been sustained by "the purchaser in consequence of the breach of the vendor's con-"tract to deliver at the place of destination. See *Dunlop* v. *Lam-"bert* (*o*). But the parties may intend an intermediate state of "things; *they may intend that the vendor shall deliver the [*236] "goods to the carrier, and that when he has done so he shall have "fulfilled his undertaking, so that he shall not be liable in dama-"ges for a breach of contract, if the goods do not reach their desti-"nation, and yet they may intend that the whole or part of the "price shall not be payable unless the goods do arrive. They may "bargain that the property shall vest in the purchaser as owner as "soon as the goods are shipped, that then they shall be both sold "and delivered, and yet that the price (in whole or in part) shall "be payable only on the contingency of the goods arriving, just "as they might, if they pleased, contract that the price should not "be payable unless a particular tree fall, but without any contract "on the vendor's part in the one case to procure the goods to ar-"rive, or in the other cause the tree to fall * * * The parties in "the present case have not, in express terms, declared their inten-"tion as to the time when the property in the coals was to be "transferred from De Mattos, who was to supply the coals, to the "company; and we are left to collect the intention from the vari-"ous stipulations in the contract. It is clear that the coals are to "be shipped in this country, on board a vessel to be engaged by "De Mattos, to be insured, and the policy of insurance and the bill "of lading and invoice to be handed over to the company. As "soon as De Mattos, in pursuance of these stipulations, gave the "company the policy and bill of lading, he irrevocably appropriated "to this contract the goods which were thus shipped, insured, and "put under the control of the company. After this he could never "have been required, nor would he have had the right to ship an-"other cargo for the company; so that from that time, that which "had originally been an agreement to supply any coals answering "the description became an agreement relating to those coals only "just as much as if the coals had been specified from the first." * * "As to one-half of the price, the balance, as it is called in the let-"ters forming the contract, the intention that it should only be "paid 'on completion of delivery at Rangoon,' seems to me as

(*o*) *Dunlop* v. *Lambert*, 6 Cl. & Fin. 600.

[*237] "clearly declared as words could possibly declare *it; and "consequently, I think, as to that half of the price no right vested "in De Mattos, unless and until there is a complete delivery at "Rangoon. But, consistently with this, there might be an inten-"tion that there should be a complete vesting of the property in "the goods in the company, and a complete vesting of the right to "the half of the price in De Mattos; so as in effect to make the "goods to be at the risk of the company, though half the price was "at the risk of De Mattos: so that the goods were sold and deliv-"ered, though the payment of half the price was contingent on the "delivery. And this, I think, is the true legal construction of the "contract." Blackburn and Mellor, JJ., were of opinion that the company were not entitled to recover back any money, and that De Mattos was not entitled to the balance of the price; Cockburn, C.J., and Wightman, J., being of the opposite opinion. On appeal to the Exchequer Chamber, Erle, C.J., Martin, B., Willes, J., Channell and Pigot, BB., came to the same conclusions as Blackburn and Mellor, JJ. And Williams, J., concurred in the views of Cockburn, C.J., and Wightman, J. On the question whether De Mattos had contracted to deliver at all events at Rangoon, Blackburn, J., considered the case identical with that of *Tregelles* v. *Sewell* (*p*).

In *Paynter* v. *James* (*q*), in 1867, the agreement was that two-thirds of the freight should be paid "on right delivery of the cargo." Held, that the payment of the freight and the delivery of the cargo were intended to be concurrent acts.

Smith v. *Myers* (*r*), in 1870, was an action for damages for not delivering 600 tons of nitrate of soda under very unusual circumstances. The defendants were merchants at Liverpool, and were in partnership with a house at Valparaiso. On the 15th of July the Valparaiso house, in obedience to the defendants' instructions, purchased 600 tons of nitrate of soda, and on the following day char-[*238] tered a ship *named the 'Precursor' to take it to England. They advised the defendants of the purchase. On the 13th of August an earthquake destroyed the greater portion of the soda, and some time afterwards the Valparaiso house cancelled the charter of the 'Precursor.' The defendants, on the receipt of the advice of the purchase of the soda by the Valparaiso house, and being ignorant of its loss, through their brokers, sold the soda to the plaintiffs. The material parts of the sold note were, "Liverpool, "Sept. 8, 1868. Messrs. William Smith and Co. We have this "day sold to you on account of Messrs. Myers, Son and Co., about "600 tons, more or less, being the entire parcel of nitrate of soda "expected to arrive at port of call, *per* 'Precursor,' at 12*s.* 9*d.* per

(*p*) *Tregelles* v. *Sewell*, 7 H. & N. 574.
(*q*) *Paynter* v. *James*, L. R. 2 C. P. 348.
(*r*) *Smith* v. *Myers*, L. R. 5 Q. B. 429; L. R. 7 Q. B. 139; 39 L. J. Q. B. 210; 41 L. J. Q. B. 91.

"cwt. * * * Should any circumstance or accident prevent the "shipment of the nitrate, or should the vessel be lost, this contract "to be void." The defendants informed the Valparaiso house of the sale, and the Valparaiso house being in doubt whether the defendants might not still be liable to the plaintiff, purchased another 600 tons of nitrate of soda; and again chartered the 'Precursor,' shipped the soda, and consigned it to the defendants. On hearing of the loss of the 600 tons first purchased, the defendants wrote to the plaintiffs' brokers saying that the contract was void, and sold the 600 tons to other parties. The plaintiffs demanded the second 600 tons. But it was held, both in the Queen's Bench and on appeal by the Exchequer Chamber, that they were not so entitled, on the ground that the goods which arrived were not those which were contracted for as expected to arrive. The cargo contracted for had perished. The contract related to goods which were to arrive by a particular voyage, which voyage was never made, and it was a mere accident that goods of the same description as those contracted for should have come consigned to the defendants in the same vessel which was to have brought those goods.

In many contracts, the delivery of the goods is a condition precedent to the right to sue for the price; but where the vendee dispenses with the performance of the condition, or the performance becomes an impossibility, the right arises at *once. Of [*239] such contracts, *Cort* v. *Ambergate Ry. Co.* (*s*), and *Taylor* v. *Caldwell* (*t*), and other cases of their class, are good examples.

In *Neill* v. *Whitworth* (*u*), in 1865, the defendants, the vendors, contracted to sell to the plaintiffs "500 bales of cotton at 15⅛*d.* per "lb., * * * to arrive in Liverpool *per* ship or ships from Calcutta. "* * * The cotton to be taken from the quay, &c." The cotton was landed on the quay, and placed in a warehouse; and on a subsequent day the defendants offered to deliver the cotton from the warehouse at quay weights free of warehouse charge, or to carry it back to the quay and deliver it there, but the plaintiffs declined to accept it, on the ground that it should have been delivered at the time and place contracted for, viz., on arrival from the quay. The Court, however, held that the words "to be taken from the quay" were not a condition precedent, but were an independent stipulation introduced solely for the benefit of the vendors, to enable them to call upon the vendees to take the cotton from the quay in order to save expense.

The following are Examples of other Forms of Conditions Precedent.

Tamavaco v. *Lucas* (*v*), in 1861, was an action for not accepting

(*s*) *Cort* v *Ambergate Ry. Co.*, 17 Q. B. 127; 20 L. J. Q. B. 460.
(*t*) *Taylor* v. *Caldwell*, 3 B. & S., 826; 32 L. J. Q. B. 164.
(*u*) *Neill* v. *Whitworth*, 18 C. B. N. S. 435; 34 L. J. C. P. 155.
(*v*) *Tamavaco* v. *Lucas*, 1 B. & S. 185; 30 L. J. Q. B. 234; 3 B. & S. 89; 31 L. J. Q. B. 296.

a cargo of wheat which the plaintiffs had contracted through the defendants, who acted as brokers, *del credere*, to sell to Dart who became insolvent. The contract was for a cargo of about 2,000 qrs. of wheat at 50*s*. f. o. b. at Taganrog, including freight and insurance to a safe port in the United Kingdom, "payment, cash in "London in exchange for shipping documents." The plaintiffs tendered a bill of lading for $1850\frac{4}{10}$ qrs., a provisional invoice for the same quantity, a policy of insurance for £3,600, and the [*240] *charter-party. The defendants refused them, contending that the policy did not cover the whole of the buyer's risks, as appeared from the provisional invoice and bill of lading; in other words, that in should have covered $1850\frac{4}{10}$ qrs. at 50*s*. = £4,626. The freight to be paid amounted to £1001 10*s*. The Court held that, inasmuch as freight would not have to be paid unless the cargo arrived, it was not necessary that the policy should cover the freight: and thus the sum uncovered amounted to £24 10*s*. only. And that the meaning of the contract was not that the policy was to be calculated at 50*s*., so as to cover the buyer's interest, but should be for such an amount as an ordinary shipper would have effected for protecting his interest in the port of dispatch. The Court refused to disturb the verdict which the plaintiff had obtained, and was affirmed in the Exchequer Chamber.

In *Sanders* v. *McLean* (*w*), in 1883, the vendor brought an action against the vendee for refusing to accept iron for which the vendee had contracted to pay in London in cash in exchange for bills of lading and policies of insurance. The bill of lading was in three parts. The vendor tendered two of them, the third being in the shipper's hands in St. Petersburgh. The vendee refused to accept, and the vendor having procured the third part, tendered all three, but at this time the ship, on board of which the iron was shipped, was so far on her voyage to Philadelphia, the place of delivery, that she would in all probability arrive there before the bills of lading, and warehouse expenses would necessarily be incurred. The vendee again declined to accept. The Court of Appeal held that the first tender was good, and that was sufficient for the case, but Brett, M.R., was of opinion that the second tender also was good.

In *Bianchi* v. *Nash* (*x*), in 1836, the plaintiff agreed to let the defendant a musical box on condition that if it were damaged while [*241] in his possession he should have it and pay an *agreed sum for it. It was damaged, and the plaintiff recovered the price in an action for goods sold and delivered.

In some cases compliance with the provisions of a statute may be a condition precedent to the right to recover the price of goods sold, but this is not the case where the object of the statute is to

(*w*) *Sanders* v. *McLean*, 11 Q. B. D. 327; 52 L. J. Q. B. 481.
(*x*) *Bianchi* v. *Nash*, 1 M. & W. 545.

enforce a penalty on the vendor where he enters into a contract without compliance, and not to make the contract void: as in *Smith* v. *Mawhood* (*y*), in 1845, where tobacco had been sold and the vendors had omitted to take out a licence or to paint their names on the premises pursuant to 6 Geo. IV. c. 81.]

(*y*) *Smith* v. *Mawhood*, 14 M. & W. 452; 15 L. J. 149; and *Cundell* v. *Dawson*, in 1847, 4 C. B. 376; 17 L. J. C. P. 311. See also 38 & 39 Vict. c. 63, [which enacts that no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance and quality of the article demanded by such purchaser, *Knight* v. *Bowers*, 14 Q. B. D. 845].

[*242] *CHAPTER III.

THE EFFECT OF A BARGAIN AND SALE IS TO TRANSFER THE PROPERTY IN THE GOODS WITHOUT ANY DELIVERY; IN THIS RESPECT ENGLISH LAW DIFFERS FROM THE CIVIL LAW.

As has been already observed, the rules which mark the difference between an executory agreement and a bargain and sale, are nearly the same as those which, under the civil law, distinguished between a mere contract to sell, and a perfect sale, "*emptio perfecta.*"

So far as those rules are founded in the nature of things, this is what might be expected; but some of the rules, which are merely technical, have been partially, and as it seems inconsistently introduced into English law. The Civil Law is founded, amongst others, upon two assumed principles, which are not recognised by the English law; one is, that a sale must be for a fixed price in money, and that a contract to part with property for a valuable recompense, not consisting of moneys numbered, cannot be a sale, but must be of a different nature. The other is, that property cannot be transferred by any agreement, unless there be an overt act of delivery of possession. Neither of these principles are recognised by the English law, and such of the rules of the Civil Law as are founded exclusively upon them, ought not to prevail in a system in which the principles themselves do not exist. It seems, however, that this has not been always kept in sight by the English judges. The Civil Law consistently declared, that there could not be a perfect sale until the price was fixed in money, though everything else was ascertained; and, consequently, that a contract to sell the whole of a particular parcel of goods, at a price depending upon the number, [*243] weight, or measure of those goods, could *not be a sale until the goods were numbered, weighed, or measured, for till then the price was not fixed in money. The contract on the part of the vendor was complete, for he was to transfer a specific ascertained thing, in the state in which it then existed, but the consideration was not a fixed sum in money, till the number, weight, or measure was ascertained. This was a defect in the sale, according to the principles of the Civil Law, but it is hard to see why it should prevent the contract amounting to a bargain and sale in English law. In many cases the weighing, &c., may be necessary to ascertain the specific goods; in others it may be necessary in order to put the goods into a deliverable state, and in those cases, the reasons are as applicable to English as to Civil Law; but where, as in *Zagury* v. *Furnell* (*a*), and *Simmons* v. *Swift* (*b*), there is nothing unascer-

(*a*) *Zagury* v. *Furnell*, 2 Camp. 240, *ante*, p. 179.
(*b*) *Simmons* v. *Swift*, 5 B. & C. 857, *ante*, p. 179.

tained except the money value of the price, and yet the goods are held not to be bargained and sold, there seems little to be said, except that such are the decisions. With this exception, however, the Civil Law seems to differ from the English, where the difference in the fundamental principles becomes material, and to agree with it in it other respects.

English Law.—Operation of Contract.

[In the English law a contract of sale has two effects (*c*). It operates as a contract giving rise to obligations or rights *in personam*, as, for example, an obligation binding the vendor to deliver on payment of the price, and binding the vendee to pay the price, and it also, in some cases, operates as a conveyance of the property from the vendor to the vendee, giving to the vendee all those real rights or rights *in rem* which follow the property.

It operates as a conveyance the moment the contract is made if the thing is specific, unless some rule of law as to *weigh- [*244] ing or measuring or otherwise prevents the passing of the property, or unless the parties have agreed that it shall not pass (*d*).

But if the thing is not specific, or is specific and some rule of law, as for example as to weighing, measuring, or putting into a deliverable state, or the intention of the parties prevents the property passing, then the contract, at the time of making, merely operates to create personal obligations and no *jus in rem* is created, and until the thing is made specific, or the rule is complied with, or the intention exists, the owner may, in defiance of his contract, sell to some third person and give him a perfectly good title even if that third person had notice of the prior contract. When the thing has been made specific, or the rule of law has been complied with, and the intention existed, thenceforward the case is the same as if these circumstances had existed at the date of the contract, and it operates as a conveyance.

In other words a contract by which it is presently agreed that when an event shall happen in future then the property shall pass, operates as follows—up to the happening of the event personal obligations only are created—after the event happens the contract operates as a conveyance, the property passes, and real rights are created.

But by the Roman Law a contract of sale was only an enforceable promise. It gave rise to obligations only, and did not operate as a conveyance of the property. With them the property could be

(*c*) Austin's Jurisprudence, 3rd ed., 1000 and 1006, Table II., note 4, C. c.

(*d*) [But the law of Scotland on this point is different. There must be delivery to pass the property; but since the Mercantile Law Amendment Act of Scotland, 19 & 20 Vict. c. 60, s. 1, which prevents the creditors of a vendor who has sold, but not delivered goods, from seizing those goods, this point has lost most of its practical importance, *McBain* v. *Wallace*, in 1881, 6 Ap. Ca. 608.]

transferred by delivery only. The Roman contract purported to pass the whole of the vendor's interest to the vendee, but it did not pass the property, for that passed by delivery only, and even delivery did not pass it if the vendor was not actually the owner. The contract merely gave rights *in personam* but no rights *in rem*. Pothier (*e*) says the contract of sale of the Roman Law comprises [*245] "An *obligation to deliver the thing to the buyer, and also "an obligation, when it has been delivered, to defend him against "all claims, which may deprive him of his possession, or prevent "him from making use of the thing as his own; but they do not, "in strictness, import an obligation to transfer the property * * *. "And, therefore, if a buyer discovers that the seller was not the "owner of the thing sold, and consequently that the property in it "has not been transferred to him, he cannot, on that account, so "long as his possession remains undisturbed, complain that the sel- "ler has not fulfilled his obligation. It is, indeed, of the essence "of the contract of sale, that the seller should not intend to retain "the right of property in the thing, when he is the owner of it; "and that in such case, he should be bound to transfer it to the "buyer * * * But when the seller is not the owner, if he in "good faith believes himself to be so, he is bound only, as above "stated, to defend the buyer against those who seek to deprive him "of his possession, or to prevent him from exercising the rights of "ownership."

The expression "Res perit domino" is a very meaningless one in the law of sales; and the distinction must be borne in mind between being the loser of the property and the loser by the contract. Whether that expression can be used as an argument that, because the risk falls on one party, therefore the property is in that party, must depend entirely on the terms of the contract. For if the parties have agreed, as they certainly may, that although the property is to be in one party, yet if the goods are lost, the other party is to pay for them, it is clear that risk is no test of property in that case. Such was the case in *Castle* v. *Playford* (*f*). The case of *Anderson* v. *Morice* (*g*), in 1875, was a case of insurable inte- [*246] *rest, and it was argued at great length that the risk was with one party, even though the property was in the other.

The judgment of Lord Cottenham, L.C., in the case of *Dunlop* v. *Lambert* (*h*), in 1839, is a very instructive one upon this point.

"We have now to determine whether, in a question between a "carrier and the person to whom the carrier is responsible in the

(*e*) Pothier's Contract of Sale, translated by Cushing, p. 1.

(*f*) *Castle* v. *Playford*, L. R. 7 Ex. 98; 41 L. J. Ex. 44. See also *Calcutta Co.* v. *De Mattos*, 32 L. J. Q. B. 322; 33 L. J. Q. B. 214, *ante*, p. 234; and *Shepherd* v. *Harrison*, L. R. 4 Q. B. 197 and 493; 5 E. & I. Ap. 116; 38 L. J. Q. B. 105 and 177; 40 L. J. Q. B 148.

(*g*) *Anderson* v. *Morice*, L. R. 10 C. P. 58; 44 L. J. C. P. 10; L. R. 10 C. P. 609; 44 L. J. C. P. 341; 1 Ap. Ca. 713; 46 L. J. C. P. 11.

(*h*) *Dunlop* v. *Lambert*, 6 Cl. & Fin. 620.

"event of the property being lost, the sending an invoice to the "consignee, by which it appeared that the property had been in-"sured and the freight paid by the consignor, and the amount of "such freight and insurance charged by the consignor to the con-"signee, deprived the consignor of the power of suing and of an "interest or right to recover the value of the property. It is no "doubt true as a general rule that the delivery by the consignor to "the carrier is a delivery to the consignee, and that the risk is, "after such delivery, the risk of the consignee. This is so if, with-"out designating the particular carrier, the consignee directs that "the goods shall be sent by the ordinary conveyance, the delivery "to the ordinary carrier is then a delivery to the consignee, and "the consignee incurs all the risk of the carriage. And it is still "more strongly so if the goods are sent by a carrier specially "pointed out by the consignee himself, for such carrier then be-"comes his special agent. But though the authorities all establish "the general inference is capable of being varied by the circum-"stances of any special arrangement between the parties, or of any "particular mode of dealing between them. If a particular con-"tract be proved between the consignor and the consignee, the cir-"cumstances of the payment of the freight and insurance is not "alone a conclusive evidence of ownership; as where the party "undertaking to deliver at a particular place, the property, till it "reaches that place and is delivered according to the terms of the "contract, is at the risk of the consignor. And again, though in "general the following the directions of the *consignee, [*247] "and delivering the goods to a particular carrier, will relieve the "consignor from the risk, he may make such a special contract, that "though delivering the goods to the carrier specially intimated by "the consignee, the risk may remain with him, and the consignor "may, by a contract with the carrier, make the carrier liable to "himself. In an infinite variety of circumstances the ordinary rule "may turn out not to be that which regulates the liabilities of the "parties."

And it is no test in Roman law, for there the loss falls on the vendee, but the property is still in the vendor.

In the Roman and Scotch law, "Risk is no test of property. The "question of risk forms a point in the law of obligations, not in "the law of transference; and the decision of it depends upon "principles quite distinct from those concerned in the question of "property" (*i*).

It may not be out of place here, while speaking of the effect of a contract of sale in English law, to point to a distinction which, although a fine one, seems nevertheless to be a clear one, between contracts which are intended to operate as sales at some future time, and contracts which are intended to operate merely as prom-

(*i*) Bell's Commentaries of the Law of Scotland, B. II., C. V. s. 1.

ises to sell. It is the difference which exists between an agreement that the property shall pass on the happening of some future event, without anything further to be done by either party in that behalf, and an agreement by which one party promises that on the happening of some event he will then transfer the property. In the latter case the property does not pass until he does sell the thing, although the event may have happened, and such a contract at *law* creates merely a personal obligation to pass the property, and that, at *law*, will not create any real right or *jus in rem*. In equity, however, the vendee is in a better position, and such a contract would, when the event had happened, give him a good equitable title to the goods against all persons excepting any one who, in the meantime and *bona fide*, may have had the property transferred to him (*k*).

[*248] *For example, if the vendor promises that on a certain event happening he will assign a particular horse, when that event happens he is bound to assign it, and in contemplation of equity, has assigned it, and if he die or become bankrupt before the assignment, equity will compel his legal personal representative to assign it (*l*).

This, among other things, was decided in *Holroyd* v. *Marshall* (*m*). There Taylor, the occupier of a mill, covenanted with his landlord that if he, Taylor, should bring any new machinery into the mill he would, at his landlord's request, assign such machinery to a trustee upon certain trusts. The sheriff, at the suit of a creditor who had obtained a judgment against Taylor, subsequently seized the added machinery before any assignment to the landlord had been made. The landlord claimed it as equitable assignee, and the House of Lords sustained his claim. The sheriff can only seize the debtor's interest, which in this case was nothing, the debtor having promised to assign to his landlord.]

The following extracts from Pothier's celebrated Treaties *Du Contrat de Vente*, will be found to throw considerable light upon the subject-matter of the last chapter. The reader must remember that Pothier wrote of the Law of France, such as it was modified by the customs of Orleans before the French Revolution, so that his positions are not always to be considered as universally true of the Civil Law, and far less to be taken as authorities for English Law.

The extracts are translated from the edition of Pothier's Works, published by M. Dupin at Paris in 1835. The first extract commences at p. 139 of the second volume, and ends at p. 144; the second extract commences at p. 147, and ends at p. 150.

(*k*) Austin's Jurisprudence, 3rd ed., 1001, Table II., note 4, C. c.; and *Holroyd* v. *Marshall*, 10 H. L. R. 191; 33 L. J. Ch. 193; *Stockdale* v. *Dunlop*, in 1840, 6 M. & W. 232.

(*l*) *Post*, p. 300.

(*m*) *Holroyd* v. *Marshall*, 10 H. L. R. 191; 33 L. J. Ch. 193.

Pothier Du Contrat de Vente, Partie IV.

"It is a principle established in the title of the Digest *de peric. et comm. rei vend.*, that so soon as the sale is perfected, *the [*249] thing sold becomes at the risk of the purchaser, though it has not been yet delivered, so that if during that time it chance to perish without the fault of the vendor, the vendor is freed from his obligation, and the purchaser is not on that account freed from his, and is not the less bound to pay the contract price.

"That the vendor should be freed from his obligation when the thing sold has perished without his fault, is a consequence of another principle, that every obligation *de certo corpore*, is destroyed when the thing ceases to exist, *Traité des Obligations*, part 3, chap. 6. This principle is founded in the nature of things, for the thing due being the subject of the obligation, it follows, that when the thing ceases to exist, the obligation can no longer exist, not being capable of existing without a subject.

"The second part of the decision, to wit, that the obligation of the purchaser does not cease to exist though that of the vendor be destroyed by the destruction of the thing, seems to be subject to more difficulty; nevertheless, it is true, and is founded in the nature of the contract of sale. This contract is of the number of those which are called consensual, which are perfected by the mere consent of the contracting parties. The delivery of the thing sold is not necessary for the perfection of the contract. The obligation to pay the price which the purchaser contracts, being then complete, by the mere agreement of the parties which has taken place, and independently of the delivery, it should survive, although the thing sold has ceased to exist, and can no longer be delivered. It is true that so long as the seller is in default by not delivering the thing, he cannot compel payment, because he cannot be permitted to demand that the purchaser should fulfil his obligation towards him, whilst on his own side he has made default in fulfilling his own. But when the obligation of the vendor is extinguished, in one of the ways in which obligations from their nature may be extinguished, the purchaser has nothing to oppose to protect himself from fulfilling on his part his obligation, which having once been bindingly contracted, cannot be put an *end to, save in one of [*250] those ways in which obligations are terminated.

"Many moderns who have treated of the law of nature, amongst whom are Puffendorf, Barbeyrac, &c., have thought that the Roman lawyers had in this matter departed from the true principles of natural right; and they maintain, on the contrary, that the thing sold is at the risk of the vendor so long as he remains the owner of it: that it is upon him that any loss befalling that thing should fall, though it was without his fault, unless the purchaser was in default by not receiving it, and in like manner that it is he who should profit from any increase in the thing sold. Their arguments

are, first, that it is a maxim recognised by the Roman lawyers themselves, that things are at the risk of their owner, *res perit domino.* The answer to that objection is, that the maxim is applicable when distinguishing between the owner and those who have the custody or the use of the thing; there the thing perishes to its owner rather than to those who have the custody or the use, who, by the destruction which has befallen the thing without their fault, are discharged from the obligation which they have undertaken to restore it. But when we are distinguishing between the owner of a thing who is debtor of that thing, and the creditor of it who has an action against the owner to make him deliver it, there the thing perishes to the creditor rather than to the owner, who, by the destruction of the thing, is discharged from his obligation to deliver it. In fact, each loses the right which he had either in the thing or to the thing when it perishes by accident. The seller who is owner of the thing loses his right of property such as he had it, that is a right which he could nothave kept, and which he was bound to have transferred to the purchaser, and the purchaser, on his part, loses the right which he had with reference to that thing, that is to say, the right which he had to cause it to be delivered.

"They object, secondly, that the purchaser has not bound himself to pay the price, save upon condition that he should have the thing given to him. I deny the proposition: he binds himself to [*251] pay the price, not on condition that the *vendor should give him the thing, but rather on condition that the vendor should bind himself on his side to him, that he will cause the thing to be given to him. It is enough, therefore, that the vendor should have entered into a binding obligation to that effect, and not broken his obligation, in order that the obligation of the purchaser should have a consideration and subsist.

"Although the reasons for the opinion of the Roman lawyers seem to me to preponderate, nevertheless, it must be owned that the question is not free from difficulty, and it appears that even the Roman lawyers have not been unanimous on this question, for Africanus in the law, 33 *ff. locat. conducti.* says positively, that if the state seize on the heritage which I have sold you before I have delivered it to you, so that it is no longer in my power to deliver it to you, I shall not, in truth, be liable to you for damages or interest, but I shall be bound to restore you the price. This text has seemed so positive to Cujas, that in his treatise *ad African.* upon this law, he has gone so far as to maintain, that according to the Roman law the thing sold was not at the risk of the purchaser, contrary to the positive decision of the other texts, and the general opinion against which he himself has written, *ad l.* 34, *s.* 5. *alia caus. ff. de contrah. empt.* Different commentators have conceived different methods of reconciling these. The most plausible is that of Davezan, Professor of our University of Orleans, in his treatise *de Contrah.* He says, that in the instance given by Africanus, if the pur-

chaser has a reimbursement of the price, it is because the laws which compel possessors to quit possession of their heritage for some public cause, have apparently this clause, 'notwithstanding all sales which they may have previously made which shall remain void.' The sale being in that case rescinded, the purchaser must be reimbursed the price, but when the thing perishes that does not rescind the sale. Even if we do not admit this method of reconciling the authorities, and if Africanus was really of a different opinion from ours, this opinion, which is imported into the Digest incidentally on another point, must yield to the positive decisions of the *other lawyers in the laws 7 & 8 *ff. de perie. et comm.* [*252] *rei vend.*, and to the decisions of the Emperors, to wit, of Alexander in the law 1, and of Gordian in the law 4, *cód. dict. tit.*, and lastly, of Justinian in his Institute *de empt. vend.*, *s.* 3, who says positively, *Emptoris damnum est cui necesse est licet rem non fuerit nactus pretium solvere.*

"309. After having settled that the thing sold remains at the risk of the purchaser so soon as the contract of sale is perfect, we must discuss when does the contract so become perfect.

"In general, the contract of sale is considered to have become perfect so soon as the parties are agreed upon the price for which the thing is to be sold. This rule has its operation when the sale is of an ascertained thing, and is pure and simple. *Si id quod venierit appareat quid quale quantum sit et pretium et pure venit perfecta est emptio, l.* 8, *ff. de peric. et comi. rei vend.*

"In the sale of those things which consist *in quantitate*, and which are sold by weight, number, or measure, as if one sells ten bushels of wheat out of that which is in such a granary, ten hundred weight of sugar, a hundred fish, &c., the sale is not perfect till the wheat has been measured, the sugar weighed, the fish counted, for up to that time *nondum apparet quid venierit.* It does not sufficiently appear which is the wheat, which the sugar, and which the fish, that are the object of the sale, since it can only be the wheat that shall have been measured, the sugar that shall have been weighed, and the fish that shall have been counted.

"It is true, that before the measuring, the weighing, the counting, and from the instant of the contract, the engagements which arise from it are in existence. The purchaser has thenceforward an action against the vendor to make him deliver the thing sold, as the vendor has an action for the payment of the price on offering to deliver it; but though the engagement of the vendor exists thenceforth, it is accurate to say, that it is not yet quite perfect, in this sense that it has but an unascertained subject, and one *which cannot be ascertained but by the measure, weight, [*253] or counting.

"It is not, therefore, until one has made this measuring, weighing, or counting, that the thing sold can be at the risk of the purchaser, for risk can only attach on an ascertained subject.

"This decision applies not only where the sale is of a certain quantity of goods to be taken from a store in which there may be more, because in that case, as we have just said, until the measuring or the weighing has taken place, the thing which is sold consists not as yet of any ascertained subject on which risk can attach: it also applies in the case where the sale is of all that there is in a store or a granary, if the sale has been made at so much for each hundred weight, for each bushel of wheat, &c.

"The sale in such case is not considered perfect, and the goods sold are not at the risk of the purchaser until they have been measured or weighed, for up to that time *non apparet quantum venierit.* The price being agreed on only at so much for each hundred weight which shall be weighed, each bushel which shall be measured, there is no ascertained price before the measuring or weighing, and therefore the sale up to that time is not sufficiently perfect to make the risk of the things sold concern the purchaser: he ought not to be charged with it till the goods have been weighed or measured.

"But if the things have not been sold by weight or measure, but *per aversionem*, that is to say, in the mass for one entire price, in that case the sale is perfect from the moment of the contract, and from that time these things, like any others, are at the risk of the purchaser. All these principles are taken from the law 35, *s.* 5, *de contrah. empt.*

"310. The thing sold being at the risk of the purchaser from the moment of the contract, when it is sold *per aversionem*, and the thing sold on the contrary remaining at the risks of the vendor until the things are measured, when the sale is by measure, it is important to know when a sale is taken to be made *per aversionem*, [*254] and when it it is taken to be *made by measure. The following rules will ascertain it:—

"*Rule* 1. It cannot be doubted that the sale is by measure, when it is expressly agreed that the price shall be for each measure, as if the contract be to sell so many bushels of wheat, which are in such a granary, at the rate of so much per bushel, or if the contract be to sell a bin of wheat in such a granary, which contains ten bushels, in each case the sale is made by measure; all the difference is, that in the first case, the surplus of the wheat, if there be more than ten bushels, is not sold, whereas in the second, the entire bin is sold, though there be in it more than ten bushels.

"*Rule* 2. When the sale is of so many measures of such a thing the sale is considered to be by measure, though by the terms of the contract there is expressed to be only one price, as if it were said, 'Sold ten bushels of wheat for five hundred livres,' the price being construed to be no more than the sum of the price for which each bushel is sold. *Non interest unum pretium omnium centum metrarum, an semel dictum sit an in singulos eos.* (*dict. l.* 35, *s.* 7, *de contrah. empt.*)

"*Rule* 3. When the sale is for one entire sum, not of so many

measures of such a thing, but of some thing which is represented to contain so many measures, the sale is made *per aversionem* (as if the sale is expressed to be of such a meadow for 1,000 livres, warranted to contain twenty acres), and therefore the thing is from the moment of the contract at the risk of the purchaser, *l.* 10, *s.* 1, *de peric. et commod. rei vend.* The mention of the number of acres has no further effect than to bind the vendor to make compensation to the purchaser for any short-coming in the quantity, if it be smaller, as has been said (*supra*, part 2).

"311. There are certain things which are sold subject to being tasted, as wine, oil, &c. These sales are even less perfect on the part of the purchaser until the things sold have been tasted than are sales of things sold by measure until they have been measured, for in the latter, from the instant of the contract, it no longer depends upon the purchaser *whether the sale shall take [*255] place. Before the goods have been weighed or measured he is as much bound to execute the contract as the vendor is, and the weight and measure do but fix and ascertain what has been sold, whereas in sales made subject to tasting, the purchaser may refuse to execute the contract if he finds the merchandize not to his taste. *Alia causa est degustandi alia metiandi; Gustus enim ad hoc proficit ut improbare liceat, l.* 34, *s.* 5, *ff. de contrah. empt.* These sales, then, up to the time of tasting, are more imperfect than those made by weight and measure, and consequently in these sales the things sold cannot be at the risk of the purchaser until he has made default in tasting them.

"According to the practice of our tribunals, differing from the Roman law, it is requisite, in order that the purchaser may be considered in default, that the vendor should have obtained a decree to order the purchaser to taste by a fixed day, or otherways that the sale shall be absolute and unqualified.

"Note, also, that it is necessary to distinguish whether the purchaser has bargained that he is to taste the goods to see whether he approves of them, or only to see whether they are good, sound, merchantable, and not spoiled. It is only in the first case that he can be off his bargain by declaring, after he has tasted, that he does not like the goods. In the other he cannot reject the goods if they be really merchantable.

"312. When a sale is made subject to a condition, any loss sustained by a partial injury to the thing during the time intervening between the making of the contract and the fulfilment of the condition falls upon the purchaser if the condition is afterward fulfilled, for the vendor is only bound to deliver it such as it may exist, provided it is not injured by his fault.

"But the total destruction of the thing falls upon the vendor, for the fulfilment of the condition, after the total destruction of the thing, cannot confirm a sale of a thing no longer existing.

"313. In sales in the alternative, whether the election be left to

[*256] the vendor or expressly given to the purchaser, the *first of the two things which perishes after the contract perishes to the vendor, for that which survives remains *in obligatione*, he is bound to deliver it; but if the surviving thing also perishes, it perishes to the purchaser, who remains bound to pay the price, though there no longer remains any of the things sold capable of being delivered to him. See what is said of contracts in the alternative, in my *Traité des Obligations, part* 2, *chap.* 2, *art.* 6.

"If they perish in the interval the vendor is similarly freed from his obligation, and the purchaser remains a debtor for the price."

Pothier Du Contrat de Vente, Partie V., Chap. 1, *p.* 147.

ARTICLE II.

Of the effect of delivery.

"319. When the vendor is owner of the thing sold, and has a capacity of alienation, or if he is not, when he has the consent of the owner, the effect of delivery is to transfer to the person of the purchaser the property of the thing sold, provided the purchaser has paid the price, or the vendor has given him credit for it.

"The contract of sale by itself cannot produce this effect. Contracts can only make personal engagements between the parties; it is only a delivery made in pursuance of the contract, which can transfer the property of the thing sold according to this rule. *Traditionibus et usucapionibus dominia rerum non nudis pactis transferuntur, l.* 20, *Cod. de pact.*

"320. Hence it follows that if the owner of a thing, after having sold it to a first purchaser without delivering it to him, has the dishonesty to sell and deliver it to a second, the property will be transferred to the second purchaser, *l. quoties* 15, *cod. de rei. vend.* The first has no more than a personal action against the vendor for damages and interest arising from the non-fulfilment of the con- [*257] tract, and he cannot take *it from the second purchaser, who *bona fide* bought it, *inscius prioris venditionis.*

"321. Hence, likewise, it follows that the creditors of the vendor may seize the things which their debtor has sold before he has delivered them, even though the purchaser has paid the price. The purchaser in such a case has no more than an action against his vendor, and has no *privilegium* upon the thing; but if once the delivery be made, the property having passed to the purchaser, the creditors of the vendor can no longer seize that thing which no longer belongs to their debtor; creditors in hypothec alone can in such a case have an action of hypothec against the purchaser or other possessor if it be an immoveable. With regard to moveables there is no *sequela* by hypothec except in the case where a lodger

or farmer has sold the furniture of the house or farm he rents, in which case custom permits the owner of the house or farm to follow the goods which are his security, but for such a *sequela* he has but the short time of a week, if it be a house, or a fortnight if it be a farm, to which the goods are attached.

"Creditors, even by chirograph, can also in one particular case follow the goods of their debtor, which have been delivered to a purchaser, to wit, when the debtor being insolvent has fraudulently sold them, and the purchaser has been a party to his fraud, being aware of the insolvency of the vendor, *tit. ff. quæ in fraud. creditor.*

"322. It is a disputed question amongst authors whether a conventional delivery made to the purchaser ought in this respect to have the same effect as an actual delivery would have had, and if it should be construed to transfer the property even with respect to third parties. Suppose, for example, that the thing has in truth remained with the vendor, and that the purchaser has had no actual possession, but that the contract of sale contains a clause by which it is said that the vendor has divested himself of the possession of the thing sold, and has given the purchaser seisin of it, declaring that thenceforward he would keep it in the name and on account of the purchaser; or suppose there be a *clause by which [*258] it is said that the vendor keeps the thing as tenant to the purchaser under a lease for a certain yearly rent. The question is, if in such a case the purchaser would have a good claim to replevy the thing, either as against creditors who had seized it in the hands of the vendor, or as against a second purchaser to whom the vendor had afterwards delivered it, and who had got into actual possession of it. Charondas, in his responses, decides in favour of the second purchaser, and he cites for his opinion two decrees: the one of 1498, the other of 1569. Belordeau, *liv.* 1, *chap.* 18, cites also for the same opinion two decrees of his parliament, that of Brittany.

"Their argument is, that as conventional deliveries have no overt act, but consist of a simple agreement made between the vendor and the first purchaser, they can have no such effect as to be considered to have transferred the property of the thing sold to the first purchaser, at least as against third persons, according to the rule, *Traditionibus et usucapionibus dominia rerum non nudis pactis transferuntur, l.* 20, *Cod. de pact.* As agreements can have no effect save between those who are parties to them, conventional deliveries which consist in no overt act, but only in the agreement of the parties, cannot be taken as against third parties to transfer the property.

"On the other hand, Gui Pape, *decis.* 112, maintains that a conventional delivery transfers the dominion and property of a thing as completely and specifically as an actual delivery, even as against third parties. By a conventionial delivery which arises from a clause of bailment to his use, or by a clause of retention under lease, or even by a simple clause of constitution, the purchaser takes

real possession of the thing sold to him, and by such taking of possession he acquires really the property: for we can acquire possession and property of a thing, not only by our own persons, but by the agency of another who takes possession in our name. . *Animo nostro corpore etiam alieno possidemus, l.* 3, *s.* 12, *ff. de acquir. vel amit. poss. Generaliter quisquis omnino nostro nomine sit in posses-* [*259] *sione . . . nos possidere videmur, l.* 9, *ff. *dict. tit.* Then by these clauses the vendor takes possession in the name of the purchaser of the thing which he sells him. The purchaser, therefore, acquires possession by the agency of the vendor, just as he might have acquired it by the agency of any other who took possession in his name. This delivery, then, has the same effect as an actual delivery, and ought as much to transfer the property. It is useless to oppose to this, the law which says, *Non nudis conventionibus dominia rerum transferuntur*, and that agreements have no effect save between those who were parties to them, for that is true of pure agreements, but those which are accompanied by a conventional delivery are not simple bare agreements, and it is expressly decided in the law 77 *de rei vindic.* that such a conventional delivery arising from a retention of the thing by the grantor as lessee, put the grantee in posssession, and transferred to him the property of the thing, and consequently a right to replevy it. From all these principles Gui Pape concludes, that a first purchaser to whom no more than a conventional delivery has been made of the thing sold, can replevy it against the second purchaser who has actually possession of it, and he bears witness that such is the constant practice of the Parliament of Dauphiny.

"I think this last opinion the better, subject to this limitation, that the proof of the delivery be established by a notarial document; or if it be under private signature, provided the priority to the actual delivery to the second purchaser, or the seizure made by the creditors be sufficiently established: *puta* by the death of one of the parties who have subscribed the document."

From these extracts the reader may observe that a contract of sale without delivery amounted to a perfect sale, under nearly the same circumstances as in English law it amounts to a bargain sale. But a bargain and sale in English law, as has been already said, transfers the legal property in goods: a perfect sale by the civil law had no effect upon the property, it was merely a personal contract binding the vendor, but not the goods. So long as the vendor con- [*260] tinues *solvent and retains the control of the goods, there is no very substantial difference in the result of the two systems of law; for by the civil law, as soon as the sale was perfect, the vendor became bound to deliver the thing sold at the time prescribed by the contract, and till then to keep it subject to the same personal responsibility as if the thing belonged to the purchaser, and were committed to the vendor as a bailee, *Domat, Civil Law, book* 1, *title*

2, s. 2, 1, 2, 3, 24, 26; and according to Pothier, it was the better opinion that he might be compelled to deliver the thing in specie, though that was doubted: and as, on the other hand, the buyer was subject to the same liabilities from the time the sale was perfect as if the property was his, and committed to the custody of the vendor as his bailee, it seems that, as far as regards the substantial result, the property as between the vendor and purchaser passed on a perfect sale; the differences being between them, rather formal than substantial, and rather affecting the form of remedy than the practical result.

When, however, the rights of third parties intervene, the difference becomes substantial. If, for instance, the vendor dies before delivery, but after the bargain and sale, then, since the property is transferred by a bargain and sale, the purchaser's right of property in the chattel is unaltered by the death; but if the property were not affected, and the contract remained merely personal, the purchaser's remedy would be good only to the extent to which the vendor left assets. Or if the vendor becomes a bankrupt, the assignees only adopt such of his contracts as are beneficial, whilst they take his whole property: therefore, if a purchaser has acquired a property in the goods, he has that as a security, if not, his remedy is worthless. Or the vendor may, as in the cases supported by Pothier, have sold and delivered the goods to a second purchaser, or they may have been seized by the vendor's creditors, in each of which cases the vested property of the first purchaser is by the English law allowed to prevail, unless under special circumstances.

The doctrine, therefore, that a bargain and sale transfers the property in the thing sold, instead of merely conferring *a per- [*261] sonal right of action, is one of practical and substantial importance.

A gentleman of great learning, Mr. Sergeant Manning, has questioned it in a note to *Bailey* v. *Culverwell* (*n*). He maintains that the rule that property is transferred by a bargain and sale without any delivery, is contrary to natural right, and is moreover a modern misapprehension arising from a mistaken construction of the civil law.

It does not seem evident in what the superior natural justice of the civil law consists. There is certainly nothing iniquitous in the rule of the civil law, "*traditionibus dominia rerum non nudis pactis transferuntur*," but had the authors of the civil law written, *sine traditionibus dominia rerum nudis pactis transferuntur*, it would have read as well. Both are rules of positive law, and if we were discussing what the law should most conveniently be, much might be said on both sides; but whether the rule of English law was originally adopted by a misapprehension or not, it is submitted that it is not modern, but the ancient rule such as has existed since English law began.

(*n*) *Bailey* v. *Culverwell*, 2 Man. & Ry. 567, n.

The case which the learned annotator cites from the Year Book (17 Ed. 4, fo. 1 & 2), as establishing his position that property at that time did not pass by a bargain and sale without delivery, is a curious one. I shall translate the whole of it, part as bearing on the present subject, and part as being a very characteristic specimen of the peculiar style of the Year Books.

"In trespass for a close broken, and corn, barley, and grass taken away.

"*Catesby. Actio non*, for long before the supposed trespass the plaintiff and defendant bargained in such a ward in London that the defendant should go to the place where, &c., and there see the said corn, barley, and things aforesaid, and if they pleased him when he saw them, that he should then take the said corn, barley, and grass, paying to the plaintiff 3*s.* 4*d.* for each acre, [*262] one with the other. And we say that *we went there, and that we saw them as aforesaid, and we were well content with the bargain, wherefore we took them, which is the same trespass. Judgment, &c.

"*Pigot.* This is no plea for divers reasons: one is, that he has said that the place, &c., is ten acres of corn, &c., whereas he should have said ten acres of land sown with corn, &c. Moreover, he hath confessed the taking, and hath not shown how he hath paid the coin to us according to the bargain, for I believe that it was not lawful for him to take them before he had made payment, for it would be most mischievous law that he should have them and not pay, &c. Moreover, when he had seen the grain, &c., he should have notified to us whether he was content with them or no, so that we should know whether he had taken them for that cause, for it cannot be a perfect bargain if it be not that each party is agreed, &c.

"*Catesby.* The plea is good enough for anything that he hath shown; as to the first conceit, that we have called them acres of corn, &c., and not of land, it is so called *vulgariter.* As to the other conceit that we have passed over the payment of the coin, I believe most bargains in the realm are void if this be law; but I hold it to be lawful for him to take them on such a bargain before any payment, for it is no mischief, for he can have his action of debt for the money when we have received the thing, wherefore, &c.; and to my apprehension in every such bargain the law presumes that as the one puts his trust in the other to have the thing for which they have bargained so ought the other, *e contra.* And as for, that we should certify him of our agreement; it would be very hard if when we were well content with the view of the thing (which is perchance in another country, at a great distance from London), to return thence to show him that; and, moreover, his bargain upon this point shows that there is no need, for he has put his will into our will, to wit, that if they pleased us on the view of

them then we should have them; by what then could he be better certified than by our taking them, &c.

"*Littleton.* As to the payment, it seems to me that it ought *to be stated, otherwise it is no plea. As if I come to a clothier [*263] and ask of him how much I shall pay for such a piece of cloth, who says so much, and I say that I will have it, but I pay him never a penny in hand, whereupon I take the cloth; there he shall have a good action of trespass against me, and it shall be no plea that I bought it without showing that I paid him, and so it is here.

"*Choke*, to the same effect, for a contract cannot be made without the assent of both parties, *quia dicitur de con, quod est simul;* for if you ask me in Smithfield how much you shall give me for my horse, and I say so much, and you say you will have him and pay not the money, do you think that for all that it is my intent that you shall have him without paying the coin? I say no; and I may sell him to another meanwhile, and you shall have no remedy against me, for otherwise I shall be compelled to keep my horse for ever against my will, if the property is in you, and you should take him when you please, which is contrary to reason, and so is it here.

"*Brian*, to the same intent: it seems to me for any words which have been pleaded in this bargain, that it was not lawful for him to take the corn, for it cannot be intended that he meant that the defendant should have the corn without paying the money. But if he had said to him, 'take and pay when you will,' or if he had given him a day for payment, then I conceive well that he could take them, and that would be a good bar if it was pleaded to so much; and further, I say that the property is in the defendant by the bargain in the case at bar, and in your cases of the horse and the cloth; nevertheless, he may not take them without the leave of the other. And he shall have a writ of detinue, but the defendant shall be excused by saying he was ready to give it up if the other had paid; and if he bring an action of debt he shall have the same plea. The case is much as where the property remains all the time in me, and nevertheless during a certain time I cannot take it: as where I deliver certain sheep to a man to soil his fields for a certain time; there the property is in me, and still during the time *I cannot take them back. For the other point, it seems to [*264] me that the plea is not good without showing that he had certified the other of his pleasure; for it is trite learning that the thought of man is not triable, for the devil himself knows not the thought of man; but if you had agreed that if the bargain pleased you then you should show it to such a one, then I grant you need not have done more for it as a matter of fact. Suppose that I enter into an obligation to you in 10*l.*, payable in two or three days afterwards, on condition that if you please to take such a horse of mine for such a trespass which I have done to you, that then, &c., and you look at the horse, but do not say if he please you or not,

wherefore I do not pay the 10*l.* Shall the obligation be forfeited? No! Wherefore, &c.

"*Catesby.* My lord, if he did not take the horse so that his act showed his intention, then you forfeit your obligation; and as for what is said, that there is no need to deliver the thing sold before payment, in the same manner, the other would not be to pay him before he had the thing sold. But as I said before, by law and reason each shall put trust in the other; and if the payment were material, I think we should have seen issues taken upon that in our books; but I have never seen them. Thus I put it, if you bring a writ of trespass against me for taking your horse, and I plead that I bought him on such a day in London in market overt, and then gave him to one B. to keep, who gave him to you and I took him, could you say in that case that I had not paid for the horse?

"*Choke.* No, for it is not material to the plea."

"*Pigot.* If I be bound to you in 20*l.* to enfeoff you in such an acre of land on such a day, if you please to accept the feoffment, shall you not be bound to show me your pleasure? Yea, verily, as it seems to me."

"*Littleton.* I cannot agree that the property is in him who buys by such words without payment; for it is not a clear bargain, but subject to a condition in law, to wit, that if he pays him it shall be good, if not it shall be void. As let us put it that I enfeoff Pigot to enfeoff [*265] Catesby: if he will not *enfeoff him, my entry is implied by law. So the performance of the condition causes the property to be in him.

"*Catesby.* As to the certification of his consent, I put it that he had become dumb after the bargain by the act of God, and did not know how to write and was of sound mind, and it seemed to him that the bargain was for his profit. What is he to do? Shall not his seizure be sufficient to prove his will? *quasi de sic*, wherefore, &c."

And thus ends the report.

"Littleton," says Lord Coke, "in composing his tenures had great furtherance in that he flourished in the time of many famous and expert sages of the law * * Sir Thomas Brian * * Sir Richard Choke * * and other Justices of the Common Pleas." According to Beatson's *Political Index*, Sir Richard Choke was appointed Chief Justice of the Common Pleas in 1462, and on the 9th October, 1471 (*o*), was appointed a Puisne Judge in the same Court. Sir Thomas Brian was appointed Chief Justice of the Common Pleas on the 29th May, 1472; and Sir Thomas Littleton was appointed a Puisne Justice of the Common Pleas in 1461; and Catesby was made a Judge in 1482; Pigot seems never to have been a Judge at all, so that on the whole it seems that in the 17th Ed. 4, A. D. 1478, Catesby and Pigot were serjeants, arguing before the Common Pleas; and that Brian was Chief Justice, Littleton and Choke, Puisne Justices. The case is a very curious one; but it seems a very strange thing to cite it, as an authority to show that a

(*o*) There seems to be an error in the Index as to these dates.

bargain and sale did not pass property without delivery. No such point is made in the cause, the question was on the effect of non-payment. Littleton and Choke seem to have thought that the construction of the bargain was, that it was to be a ready money exchange, and that therefore there was no intention to change the property (*p*). Brian clearly thought that the bargain was one of mutual trust, and that the property passed but *not the [*266] right of possession. His judgment might have been delivered yesterday, as it is precisely what the law is understood to be after the lapse of three centuries and a half. But none of the judges seem to have had the least doubt that the property might be changed without a delivery of the goods. And in a case a few years earlier (2 Ed. 4, 25,) it is argued by counsel and agreed by the Court, that "If I give to you my goods at York, and before you take possession of them a stranger takes them, you shall have trespass against the stranger, for by the gift the property was in you." In the 49 Hen. 6, 18, 10 Ed. 4, 19, the same point is stated as an illustration. Choke there says, "This is not like where I purchase a horse for a price of 20 shillings, there forthwith the 20 shillings are due to him, for by the sale the property of the horse is in me, and I can seize him."

"*Catesby.* If I buy a horse of you for 20 shillings, you may keep the horse till I pay you."

"*Choke.* I do not speak to that extent, but I say that the property is in me by the sale; so that if a stranger take him I shall have an action of trespass."

"*Brian* to *Catesby.* Sir, in your case, if you gave him a day for payment, you cannot detain the horse."

In *Wortes* v. *Clifton* (*q*), Lord Coke points out this very thing as an instance of the difference between the civil and the common law, "as the civil law is that a gift of goods is "not good without delivery, but it is otherwise in our law." It must be observed, that in a work of very high authority (2 Saunders, 90, n. (*e*)), it seems to be thought that this applies to a gratuitous parol gift; if it did do so, the proposition would *à fortiori* extend to a case of sale, but it does not seem to me that the word "done" in law French does import *prima facie* that the transaction was gratuitous. It is certainly used in many cases in which there appears to have been a consideration; and there is no case in which it was decided that the property passed, in which it appears *affirmatively that the [*267] gift was gratuitous; so that there seems no ground to question Lord Tenderden's position in *Irons* v. *Smallpiece* (*r*), that Lord Coke's dictum must be confined to cases where there was a binding bargain for a consideration, or a deed under seal.

(*p*) It is worth remarking that the crops which seem to have been growing are treated as *goods* throughout the case, and not as a part of the freehold.

(*q*) *Wortes* v *Clifton*, Rolle. Rep. 61.

(*r*) *Irons* v. *Smallpiece*, 2 B. & A. 551.

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*CHAPTER IV.

EQUITABLE INTERESTS AND ASSIGNMENTS.

[So far those interests chiefly which are legal interest in goods have been considered. In this chapter the subject of the creation and assignment of equitable interests is discussed. As questions relating to such equitable interests not unfrequently arise out of contracts for the sale of goods, and as the law applicable to any particular case sometimes depends upon a very critical examination of the facts of that case, the subject is treated at some length without further apology.

Equitable interests in goods or in the proceeds arising from the sale of goods, or in a specific fund, may be created in a variety of ways.

An equitable interest in a specific fund is both created and assigned in the case which is commonly spoken of as an equitable assignment of a debt.

Rodick v. *Gandell* (*a*), in 1852, is an instance of this sort; the facts of the case are set out later on (*b*). Lord Truro, after reviewing all the cases on the subject, said that the principle to be extracted from them was that "An agreement between a debtor and "a creditor that the debt owing, shall be paid out of a specific fund "coming to the debtor, or an order given by a debtor to his creditor "upon a person owing money or holding funds belonging to the "giver of the order directing such person to pay such funds to the "creditor, will create a valid equitable charge upon such fund," or in other words, "will operate as an equitable assignment of the debts "or fund to which the order refers (*c*)." The relationship [*269] of the parties which Lord Truro is contemplating here is where A. owes money to B. and B. owes money to C. In the first case which he puts there is an agreement between B. and C., that C. shall be paid out of the money owing by A., and in the second case, B. gives an order to C., in which he directs A. to pay the money to C.

Where a person covenants to assign goods as soon as he becomes the owner of them, but which he has not at the date of the covenant, an equitable interest in the goods is created and passed to the assignee as soon as the covenantor becomes possessed of the goods.

(*a*) *Rodick* v. *Gandell*, 1 De G. M. & G. 777.

(*b*) 295.

(*c*) See *Ex p. Moss*, 14 Q. B. D. 310; *Ex p. Nichols*, 22 Ch. D. 782; *Brice* v. *Bannister*, 3 Q. B. D. 569; *Tooth* v. *Hallett*, L. R. 4 Ch. Ap. 242; *Percival* v. *Dunn*, 29 Ch. D. 128; *Ex p. Hall, In re Whitting*, 10 Ch. D. 615; *In re Irving, Ex p. Brett*, 7 Ch. D. 419; *Crossley* v. *City of Glasgow Co.*, 4 Ch. D. 421.

An equitable interest is also created where goods are deposited in the hands of one person upon certain trusts, as for example, to sell the goods and pay over the proceeds or a portion of them to some person. A trust is here created, and the *cestui que trust* has an equitable interest in the goods, or, if they have been sold, in the proceeds of the sale, which are a specific fund on which the trust attaches (*d*).

Equitable interests of this latter kind have been alleged to have been created in several reported cases where goods have been consigned, and bills of exchange have been drawn "against" that consignment. It will be found on examining the cases that such expressions are not sufficient, even if any evidence of the creation of a trust.

In the simple case where the vendor consigns goods to the vendee, drawing on him for the price, and nothing further is said, that merely makes the vendee owner of the goods and debtor for the price. The relationship is that of debtor and creditor and not of trustee and *cestui que trust*. But if goods are consigned and received on the terms that certain bills are to be paid out of the proceeds, then the relationship of trustee and *cestui que trust* is created.

The consignee takes the goods in trust, to give effect to *those rights which the consignor has reserved, and those [*270] rights appear to be in equity, rights not merely *in personam*, *i. e.* against the consignee, but rights *in rem* against those particular goods, or the proceeds of them, and consequently are good not only against the consignee but against any one who takes the goods or the proceeds subject to the equities which affect them in the hands of the consignee.

The consignee or bailee cannot do anything inconsistent with the contract. The rule of law as stated by Lord Justice Mellish in *Vaughn* v. *Halliday* (*e*), is, "that if a remittance is sent for a particular purpose, whether it be by bills or a remittance in money, "the person who receives the remittance must either apply it for "the purpose for which it was sent, or else return it."

Whether a contract to create a charge upon the goods or on the particular fund arising out of the sale of those goods can be proved depends upon the evidence. But it is not to be presumed from the mere fact that the goods have been consigned and bills drawn on the consignee against or in respect of that consignment, whether it appears that the bills were so drawn either upon the face of the bills themselves or in the correspondence. The accept-

(*d*) See the judgment of Jessell, M. R., in *In re Hallett's Estate* in 1879, 13 Ch. D. 707, where the following of earmarked, and funds held upon trust was fully considered, as also the meaning of a "fiduciary" relation: and the *New Zealand Co.* v. *Watson*, in 1881, 7 Q. B. D. 374; *Birt* v. *Burt*, 11 Ch. D. 773; *Harris* v. *Truman*, 9 Q. B. D. 264.

(*e*) *Vaughn* v. *Halliday*, 9 Ch. Ap. 568.

ance of a bill drawn against goods is merely a promise to pay for the goods according to the tenour of the bill, and is not a promise to pay out of a particular fund (*f*). A statement that they were so drawn is generally nothing more than a statement of the way in which the right to draw the bill has arisen.

It must also be borne in mind that it is not sufficient to create this trust, that the goods were consigned upon trust. It must be proved that the goods were also received upon that trust. For, in the case where goods are consigned to a person with instructions to apply the proceeds of them to a certain purpose, he is not bound to undertake that duty. He may decline to receive or to hold them for that purpose, and if he does so he has no right to take possession of them, and if they come into his possession he has no right [*271] to retain them. *If he has made no contract with the consignor he holds them in trust for the owner, and cannot assert any lien over the goods. Until the consignee has undertaken to perform the conditions on which the goods were deposited with him, he has no right either to get or to keep possession of the goods (*g*).

The next question is, assuming such equitable interests to have been created, can they be assigned?

An equitable assignment is nothing more than an assignment, bad at law but good in equity, of an interest either in goods or in a specific fund, which interest may be either legal or equitable.

Where a debtor, as in the case put in Lord Truro's judgment already cited (*h*), gives an order to his creditor upon a third person, ordering that third person to pay a specific fund to the creditor, that is an equitable assignment of the fund. But an order to pay out of *any* funds, is not an equitable assignment of any funds (*i*). In this latter case, however, possibly there may be an assignment which is good in equity, not of an interest but of a contract, just as at law a contract is assigned by the indorsement of a bill of exchange (*k*).

The question is most commonly raised where goods have been consigned to a person on the understanding that bills are to be drawn on the consignee and to be paid out of the proceeds of the consignment, and the bills have been handed by the drawer to third parties, who set up a claim to have their bills paid out of those proceeds. They assert their claim on the ground that they are holders of the bills, and as such are the assignees of the assignor's equity to have the bills paid out of that security.

Now there was no doubt that in *Ex parte Warring* (*l*) the security had been deposited in trust to pay the bills; there is no doubt [*272] also that the holders were the indorsees of those *bills.

(*f*) *Ex parte Carruthers, In re Higginson*, 3 De G. & S. 570.
(*g*) *Shepherd* v. *Harrison*, 5 E. & I. Ap. 116; 40 L. J. Q. B. 148; *ante*, p. 202.
(*h*) *Ante*, p. 268.
(*i*) See *Percival* v. *Dunn*, 29 Ch. D. 128.
(*k*) See also the Judicature Act, 1873, s. 25, subs. 6, and *Walker* v. *Bradford Old Bank*, 12 Q. B. D. 342 and 511.
(*l*) *Ex parte Waring*, 19 Ves. Jun. 345; 2 Rose, 182.

Yet it is quite clear from Lord Eldon's judgment that they had no equitable right to that security, but were mere creditors on the bills. An equitable interest had been created, but it had not been assigned.

The indorsement of the bill is a mere assignment of the debt, and not an assignment of the right to have the securities appropriated. The holder of the bill is, if the debtor accepts the bill, a mere creditor on the bill of both the drawer and acceptor. If the debtor does not accept it, the holder is not even a creditor of the debtor, but merely a creditor of the assignor.

But if, besides the indorsement of the bill, there is evidence to show an intention to assign an interest in the security as well as the debt, then, whether the debtor accepts the bill or not, the holder is in equity the assignee of the assignor's equitable interest, and has the right to have the securities appropriated to his bill. It does not appear to be necessary to prove that there is any contract between the assignee or bill holder, and the holder of the securities. It seems to be sufficient to show a contract between the assignee and the assignor. The case in its simplest form is where a sum of money is deposited with a person in trust to hold it for the depositor, and the depositor assigns that specific sum to a third party. The assignee has become, in contempletion of equity, the owner of the sum, and has a right to say to the person holding it, pay it over to me. Just as where he was in contemplation of equity the owner of goods, he would have the right to say to the person holding them, hand the goods over to me.

Assuming that the goods were deposited on trust, and that there is a good assignment, it must be noticed in passing that the assignee takes his assignor's interest, subject to all equities which affect it in his hands.

It may be important that the debtor or holder of the securities should have notice of the assignment, for the assignee's title is an equitable one only (*m*), and therefore it seems that if the holder of the securities had no notice of the assignment, *he might, in [*273] certain circumstances, safely pay over the fund to any one who had given value for it, and that person would have as good an equity and a better title at law than the assignee. But if, after notice, the holder of the security hands it or the proceeds to any one but the assignee, he is a wrong-doer.

In these cases, as well as in those where it is the property which is being dealt with, there may be an interest created by estoppel. Although there may have been no actual contract of assignment between the assignor and the assignee, yet the assignor may have made representations as to the facts, the truth of which he might be estopped from denying. And the holder of the securities or debtor may, by representing that he owes the debt, or that he holds the securities or the fund on a trust, estop himself from subsequent-

(*m*) *In re Freshfield's Trust*, 11 Ch. D. 198.

ly denying the truth of those statements. As V.-C. Wigram said (*n*), "Courts, both of law and equity, have held repeatedly that "where a creditor, on whose behalf a stake has been deposited by "the debtor with a third person, receives notice of that fact from "the stakeholder (the third person), the notice will convert a stake-"holder into an agent for and a debtor to that creditor."

There is a point of some difficulty connected with this subject which has given rise to an arbitrary and unnecessary rule of law, known as the rule in *Ex parte Waring* (*o*). The difficulty arises where securities have been deposited by a consignor on the understanding that certain bills are to be paid out of those securities, and the bills have been indorsed away, and both the consignor and the consignee have become insolvent. It only arises where there was a trust between the consignor, or drawer, and the consignee, or acceptor, to pay the bills out of the proceeds of those goods. Where there is also a double insolvency no difficulty arises where either the drawer or the acceptor remains solvent. Nor does it arises in [*274] the case where the drawer has not parted with the *bills, but remains the holder of them. He has his right arising out of the contract to have the securities appropriated to the payment of the bills, and to have the balance of the securities, if any, handed over to him. But if he has indorsed away the bills, the difficulty does arise, for the holders have no right in themselves to have the securities appropriated in that manner if they have made no contract with respect to those securities; they are mere creditors on the bills; they are merely assignees of the debt by the indorsement of the bill, but not of an equity to have the debt paid out of a particular fund.

The rule in *Ex parte Waring* (*p*) was first adopted by Lord Eldon in that case, and has been since followed as a rule of law by all the Courts.

The difficulty or complication may be stated in many ways, but it is only a statement of an apparent, and not of a real difficulty, as will be seen when examining the Scotch procedure in such cases later on (*q*).

If the case be considered from the point of view of the trustee in bankruptcy of the drawer, the difficulty seems to be this. He wants to get possession of the securities. This he can only do by giving up the bills of exchange to the acceptor's trustee. If, in order to do this, he pays the bill holders in full, and so gets back the bills from them, and then exchanges the bills for the securities, he not only pays the holders in full, which is to prefer them to the other creditors of the drawer, but the bill holders are paid exclusively out of the drawer's estate, whereas being also creditors on the acceptor's estate they should have been partly paid out of that estate, and so

(*n*) Tudor's Leading Cases in Equity, 4th ed., 778.
(*o*) *Ex parte Waring*, 19 Ves. Jun. 345; 2 Rose, 182.
(*p*) *Ex parte Waring*, 19 Ves. Jun. 345; 2 Rose, 182.
(*q*) Page 309.

the acceptor's creditors get an advantage at the expense of the drawer's creditors.

The case may be considered from the point of view of the acceptor's trustee. He can only make use of the securities for the purpose of paying the bills; the securities having been deposited for that purpose only; but the bill holders *have no right to [*275] say to him, "You *must* make use of them for that purpose." And if he does make use of them for that purpose, he gives the bill holders a preference which he was not compelled to give and has no right to give. On the other hand, if he does not so make use of them, they remain in his hands unavailable, for the drawer being also insolvent cannot pay the bill holders in full, and until that has been done, he cannot get them back into his possession.

The difficulty was simply a practical one—how to make the securities available in such a complicated state of circumstances. The rule laid down by Lord Eldon for the first time in *Ex parte Waring* (*r*) enables the bill holders to avail themselves of the equity of the drawer, and to have the securities appropriated in the hands of the acceptor to their bills. The rule is applied in cases of double bankruptcy or insolvency, or a bankruptcy and an insolvency, where both estates are under the control of the Court, and whether the bill holders had or had not notice that the securities had been deposited to meet the bills, and whether the security belonged to the drawer and was pledged with the acceptor, or belonged to the acceptor and was pledged with the drawer.

The cases which appear to bear out these propositions will now be considered in the following order for the sake of simplicity. Firstly, those cases where the question was, Were the goods deposited upon trust (below); secondly, the assignment of an equitable interest (page 293); and thirdly, the rule in *Ex parte Waring* (*r*) (page 303.)

Firstly. Were the goods or other security deposited and received upon a trust?

In *Tooke* v. *Hollingsworth* (*s*), in 1793, the plaintiff in Manchester, and Daniel in London, had agreed that the plaintiff should draw from time to time on Daniel remitting him light guineas and bills to meet the acceptances. Daniel absconded and was declared bankrupt, and the defendant was appointed his assignee. The plaintiff, who was ignorant of *these facts remitted to Daniel [*276] certain guineas and bills,—the subject of this action in trover—which came into the possession of the defendant. The plaintiff paid the bills when due, and Lord Kenyon, C.J., and Ashurst and Grove, J.J., held that the plaintiff was entitled to have the securities returned to him. Buller, J., took a different view, and was of opinion that the plaintiff was not entitled to recover, apparently on

(*r*) *Ex parte Waring*, 19 Ves. Jun. 345; 2 Rose, 182.
(*s*) *Tooke* v. *Hollingworth*, 5 T. R. 215.

the ground that the parties had not a particular transaction only in their contemplation, but had come to a general agreement which was to form the basis of a general dealing between them to any extent, and to be continued to an indefinite length of time. There is nothing in the judgments of the other three judges to show that this distinction was not present to their minds. They appear to have decided the case on the broad ground mentioned in the judgment of Ashurst, J. (*t*), that, "where goods are sent by one man "to another for a particular purpose, and they have not been (and "cannot be) applied to that purpose, the former may recover them "back again."

In *Walker* v. *Birch* (*u*), in 1795, J. Forbes deposited certain cotton with Greaves and Co, who promised to pay the proceeds to J. Forbes, when and as received. J. Forbes was the agent of Caldwell and Co. Caldwell and Co. were indebted to Greaves and Co., and both became bankrupt, and Greaves and Co.'s assignee claimed to assert a lien over the cotton and to retain the proceeds. But the Court held that they had no lien; for Greaves and Co., had expressly undertaken to pay over the proceeds. The fact that J. Forbes was the agent of Caldwell does not appear to have been communicated to Greaves and Co. And Lord Kenyon, C.J., did not think that was of much importance.

In *Bernales* v. *Fuller* (*x*), about 1810, the defendants were bankers with whom the plaintiff, as holder, had deposited a certain bill [*277] of exchange, payable at their house. Puller, who *was the acceptor, sent a clerk to Fuller's with money to pay the bill. The clerk placed the money on the counter saying he had brought it to pay the bill. Fuller's clerk took the money, but said he must see Fuller before giving up the bill, and subsequently declined either to give it up or return the money. The Fullers believed they had a right to do this, having a banker's lien over Puller's money in account with him. The plaintiff contended that the money had been paid to the Fullers for his use. Lord Ellenborough, C. J., was at first of opinion that there had been no receipt of the money for that purpose. But a new trial was granted, on the ground that as the Fuller's did not at once refuse to receive it they must be taken to have received it for that purpose.

In *Williams* v. *Everett* (*y*), in 1811, Kelly, who was a merchant at Capetown, wrote to the defendant, his correspondent in London, enclosing two bills and requesting him to pay the proceeds of the bills to certain persons, one of whom was the plaintiff, and he added that he desired "the amounts paid each person to be put on the "back of their respective bills." Kelly appears to have advised the plaintiff that he had sent the bills to the defendant with the

(*t*) 5 T. R. 228.
(*u*) *Walker* v. *Birch*, 6 T. R. 258.
(*x*) *Bernales* v. *Fuller*, 14 East, 590.
(*y*) *Williams* v. *Everett*, 14 East, 582.

above instructions, and the plaintiff then applied to defendant for payment. The defendant declined to act on Kelly's instructions and refused to pay the plaintiff, but he subsequently received payment of the bill by Kelly when it became due. The plaintiff brought this action to recover that part of the proceeds of the bill which the defendant had been instructed by Kelly to pay over to him. It was argued for the plaintiff that the defendant by receiving the bills had undertaken to apply them to the purposes for which they were sent. But Lord Ellenborough, C. J., upholding the non-suit, said there had been no such assent either express or implied by the defendant, and that Kelly might countermand his instructions respecting the remittances as often as he pleased, and that the defendant would hold the remittances for the use of the remitter himself, until by some engagement with the plaintiff the remittances were appropriated to him.

*In *Snaith* v. *Burridge* (*z*), in 1812, Kieran and Co. of [*278] Dundalk and Graeme and Co. of London had engaged in a joint transaction to supply stores to the Government. Kieran and Co. shipped a cargo of pork to Portsmouth, sending the bill of lading to Graeme and Co., who, being desirous of raising money, pledged it with the plaintiffs, their bankers. Graeme and Co. became bankrupt, and when the cargo arrived the captain refused delivery to the plaintiffs and placed it in the defendants' warehouse. Graeme and Co. appear to have thought they had a right to pledge the cargo as Kierin and Co. were considerably in their debt. But the Court held not. Mansfield, C. J., delivering the judgment said, "it was "clear that it (the pork) was intended by the shipper to be deliv-"ered into the Government stores, and as he consigned it to Graeme "on those terms, it therefore must be taken to be accepted by them "for that purpose; and if so, it could not be legally diverted to "any other purpose" (*a*). This case was before the Factors Acts.

In *Frith* v. *Forbes* (*b*), in 1862, one question was whether the securities had been received in trust to pay certain bills out of the proceeds. Another was whether the bills had been assigned subject to any equity affecting them. Forbes and Co., the defendants, were the agents in London of Begbie and Co. of Rangoon, upon the terms of a letter which Forbes and Co. had written to Begbie and Co., saying that they would open an account upon which Begbie and Co. might draw, keeping the account at all times covered. Begbie and Co. had sold a yacht for the plaintiffs to the King of Burmah, and received in payment a quantity of teak and cutch. Instead of consigning these direct to the plaintiffs, Begbie and Co. consigned them to Forbes and Co. per the 'China,' and advised them of it in a letter in which they stated that they enclosed the

(*z*) *Snaith* v. *Burridge*, 4 Tount. 684.
(*a*) See also *Burn* v. *Brown*, in 1817, 2 Stark. 272.
(*b*) *Frith* v. *Forbes*, 31 L. J. Ch. 793, and on appeal, 4 De G. F. & J. 409, and *post*, p. 299.

bills of lading for certain teak and cutch, "against which we have [*279] "valued on you at six months sight in *favour of Messrs. "Frith and Co." the plaintiffs). The bill of exchange referred to "was in these terms, "Six months after sight . . pay to the order "of Messrs. Frith and Co. . . the sum of 1200*l* . . and place the "same . . to account consignment per 'China.'" Begbie and Co. sent the bills of exchange to the plaintiffs. Forbes and Co. having heard of the insolvency of Begbie and Co. declined to accept them when presented, and claimed to retain possession of the cargo and to set it off against Begbie and Co.'s debt to them on the general account. The plaintiffs filed a bill against Forbes and Co. to have it declared that they were entitled to a charge on the proceeds of the cargo in priority to Forbes and Co.'s lien. Sir John Romilly, M. R., held that they were not so entitled, but on an appeal the Lords Justices held that they were.

Lord Justice Turner said, "If a consignee thinks proper to "accept an assignment, with express directions to apply it or the "proceeds of it in a particular mode, he cannot, as I appre-"hend, set up his general lien in opposition to those directions. "In such a case only what remains after answering the particular "directions can, as I think, become subject to the general lien." And speaking of the terms of the letter from Begbie and Co. to the defendants stating that the bill was drawn against the cargo of the 'China,' the Lord Justice said those were "terms which could "not be construed otherwise than as meaning that the bills were to "be paid out of the proceeds of the consignment."

It is to be noticed that this was a very peculiar case, and may be explained as being one where a principal instructed an agent to hand over certain funds to a third person. (*c*).

In *Trimingham* v. *Maud* (*d*), in 1868, the facts, which were complicated, appear to have been that the course of business was for Barron and Co., of Barbadoes, to draw on Rattray and Co., of London, and to sell the drafts in Barbadoes. They also bought bills in Barbadoes, and sent them to Rattray [*280] *and Co. for the purpose of keeping them in funds to meet the bills. These remittances were not stated to be sent to cover any particular bills. Rattray and Co. became insolvent, and at that date there were current acceptances of Barron and Co.'s drafts for a large amount. Barron and Co., who had not heard of the insolvency, sent off to Rattray by three mails, remittances which subsequently realized 11,791*l*. By the same mails there arrived from the holders drafts on Rattray and Co. to the extent of 16,000*l*. In their letters, in which the remittances were enclosed, Barron and Co. said, "We beg to advise the following drafts;" and then followed a list of the drafts for the 16,000*l*., and then they pro-

(*c*) See *Brown, Shipley & Co.* v. *Kough*, W. N. 1885, 116, not yet reported in the other reports.

(*d*) *Trimingham* v. *Maud*, L. R. 7. Eq. 201; 38 L. J. Ch. 207.

ceeded, "We enclose the following firsts of exchange," being the remittances for 11,791*l.* now in question. The drafts were not accepted, and Barron and Co. became insolvent. It appears to have been argued for Barron and Co., that the remittances had been sent as cover for the drafts for 16,000*l.*, and that as those drafts had not been accepted they had a right to have the remittances back again. But V. C. Giffard held otherwise. This case was the subject of observation in *Ex parte Gomez* (*e*). There does not seem to have been any evidence of an appropriation beyond the fact that the remittances were sent and the drafts were advised in the same letters. They seem to have been sent as cover for all the outstanding acceptances generally.

In *Field* v. *Megaw* (*f*), in 1869, the plaintiff was a corn merchant in London. The defendant was a member of the firm of Hamilton and Co, of Belfast. The plaintiff had purchased a cargo of wheat, *ex* 'Maraquita,' and Wedd, being desirous that the cargo should be sold by Hamilton and Co., in Belfast, advanced Field 500*l.*, for which Field accepted a bill in which the consideration was described as "value received in wheat *ex* 'Maraquita.'" It was agreed at the same time that the bill should be renewed from time to time until Field should have received the proceeds of the sale, at *which time he promised to pay the bill. No notice [*281] of this agreement was given to Hamilton and Co. The plaintiff stopped payment. Wedd claimed the 500*l.* from Hamilton and Co., and they paid that sum to him. This action was brought by the plaintiff to recover back the 500*l.* from the defendant, who represented Hamilton and Co. The plaintiff denied having made the wheat a security for the payment of the 500*l.*, and the Court held that there was no equitable charge. It was an agreement to pay when the proceeds should be received, not a contract to pay out of those particular proceeds.

In the case of *In re New Zealand Banking Corporation, Levi's Case* (*g*), in 1869, the holders of bills sought to have certain securities appropriated to those bills.

The New Zealand Banking Corporation had made advances to Levi, which were covered by securities which Levi had deposited with the Corporation. Subsequently the New Zealand Banking Corporation, at Levi's request, granted a credit to White and Co. McKenzie drew bills in favour of Levi on the New Zealand Banking Corporation, who accepted them. These bills were drawn by McKenzie on account of White and Co., and on White and Co.'s credit with the New Zealand Banking Corporation. Both the New Zealand Banking Corporation and Levi were insolvent; and Overend, Gurney and Co., as holders of these last-mentioned bills, sought to have the securities appropriated to the bills of which they

(*e*) *Ex parte Gomez* 10 Ch. App. 647.
(*f*) *Field* v. *Megaw*, L. R. 4 C. P. 660.
(*g*) *In re New Zealand Banking Corporation, Levi's Case*, L. R. 7 Eq. 449.

were the holders, on the principle of *Ex parte Waring* (*h*). But Lord Romilly, M. R., held that the securities had not been deposited to cover those bills, and therefore *Ex parte Waring* (*h*) did not apply.

In the case of *In re General Rolling Stock Co., Ex parte Alliance Bank* (*i*), in 1869, the General Rolling Stock Co. made an ad- [*282] vance to Murray, for which he gave his *acceptances and deposited the security in question. The Alliance Bank had become the holders of some of these bills, and before they became due but after the Alliance Bank had become the holders, Murray, who was desirous to have the loan continued, accepted, at the request of the General Rolling Stock Co., a fresh set of bills in place of the first set. Both Murray and the General Rolling Stock Co. were insolvent, and the Alliance Bank sought to have the securities appropriated to their drafts, on the rule in *Ex parte Waring* (*k*) But the Court held that the rule was not applicable; for although the securities had been deposited to cover the first-mentioned bills, Murray's liability on them to the General Rolling Stock Co. had been cancelled by his acceptance of the second set, at a time when the parties had a right to deal with the security as they pleased, and therefore the securities were no longer a security against the first set.

In *Shepherd* v. *Harrison* (*l*), in 1871, where the bill of lading was handed over to the consignee on condition of a bill of exchange being accepted, the consignee retained the bill of lading but refused to accept the bill of exchange. The House of Lords held that he had no right of action against the shipowner for refusing to deliver up the goods.

The case of *Robey and Co.'s Perseverance Iron Works* v. *Ollier* (*m*), in 1872, was very much like *Frith* v. *Forbes* (*n*). A distinction seems to be that in *Robey* v. *Ollier* (*m*) there was no evidence of a contract by the defendant to pay the debt of the proceeds, and in *Frith* v. *Forbes* (*n*) there was such a contract.

In *Robey's and Co.'s Perseverance Iron Works* v. *Ollier* (*m*), in 1872, Brown of Ibraila consigned a cargo of maize, per 'Acacia,' to the defendant. Brown was the defendant's agent at Ibraila, but occasionally he made purchases at their joint risk, and this was such a transaction. Brown sent the defendant a letter advising him of the consignment, and saying that he had drawn on him [*283] against the cargo. He *subsequently forwarded the bill of lading. The defendant answered that the drafts "on account of

(*h*) *Ex parte Waring*, 19 Vesey, junr., 345; 2 Rose, 182, *post*, p. 304.

(*i*) *In re General Rolling Stock Co., Ex parte Alliance Bank*, 4 Ch. App. 423; 38 L. J. Ch. 714.

(*k*) *Ex parte Waring*, 19 Vesey, Junr., 345; 2 Rose, 182.

(*l*) *Shepherd* v. *Harrison* L. R. 4 Q. B. 197 and 493: 5 E. & I. Ap. 116; 38 L. J. Q. B. 105 and 177; 40 L. J. Q. B. 148.

(*m*) *Robey & Co.'s Perseverance Iron Works* v. *Ollier*, 7 Ch. App. 695.

(*n*) *Frith* v. *Forbes*, 31 L. J. Ch. 793, on app.; 4 De G. F. & J. 409.

this cargo shall have due protection." Brown was indebted to the plaintiffs, and endorsed the drafts to them. The drafts were in these words :—"Pay to the order of myself the sum of 250*l.*, which place to account cargo per A." The plaintiffs presented the drafts, but the defendant refused to acccept, Brown being insolvent. The defendant sold the cargo, and the plaintiffs claimed to have the proceeds appropriated to their bills. James and Mellish, L.JJ., held that they had no such right. James, L. J., said, "I am not prepare "to say that merely because a bill of exchange purports to be "drawn against a particular cargo, it carries a lien on that cargo "into the hands of every holder of the bill. In *Frith* v. *Forbes* "(*o*) there were grounds for saying that the intention was to give "Frith, Sands, and Co. an equitable interest in the cargo, for the "letters of consignor to the consignees referred to bills of exchange "which the consignor had drawn in favour of Frith, Sands, and "Co. Here the reference is only to bills which the consignor had "drawn to his own order, not mentioning any third parties. In "*Frith* v. *Forbes* (*o*) the cargo was the property of the consignor, "who had full right to dispose of the proceeds as he pleased. Here "Brown was not the owner of the cargo, but had only a joint in-"terest in it. Moreover, his letters to the defendants were not "communicated to the plaintiffs, who did not advance their money "on the faith of them" (*p*).

In the *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (*q*), in the House of Lords in 1873. The course of business was for the New Orleans Bank to draw on the Bank of Liverpool, to sell the drafts in New Orleans, and to remit securities to the Bank of Liverpool, so as to keep that bank out of cash advances. The plaintiffs, the Louisiana Bank, were holders of bills drawn by the New Orleans Bank *on the Bank of Liverpool. The [*284] New Orleans Bank suspended payment, and the Bank of Liverpool refused to accept the bills, although having in its possession securities of the New Orleans Bank amply sufficient to meet the bills, on the ground that the securities had not been appropriated to the bills, and that therefore they must be returned to the receiver of the New Orleans Bank. The Louisiana Bank filed a bill against the Bank of Liverpool and the New Orleans Bank, and sought to restrain the Bank of Liverpool from paying over the securities to the trustee of the New Orleans Bank, and to have them appropriated to their bills. A the time when the Louisiana Bank purchased the bills, the agent of the New Orleans Bank stated that the bills

(*o*) *Frith* v. *Forbes*, 31 L. J. Ch. 793, on app., 4 De G. F. & J. 409.

(*p*) See also *Ex parte Carruthers, In re Higginson*, 3 De G. & S. 570; and *Lutscher* v. *Comptoir d'Escompte de Paris*, 1 Q. B. D. 709.

(*q*) *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans*, 6 E. & I. App. 352; 43 L. J. Ch. 269. This case was on the same facts as *Thomson* v. *Simpson*, L. R. 5 Ch. Ap. 659; 39 L. J. Ch. 857.

were drawn against funds to a much larger amount already remitted to the Bank of Liverpool.

The Louisiana Bank relied upon two alternative grounds: first, that there had been an equitable assignment of these securities to them; and, secondly, that the New Orleans Bank were estoppel from denying that the securities were appropriated to the plaintiffs by reason of the representations of their agent to them.

Lord Selborne, L.C., dealt first with the question of estoppel. His judgment is very instructive. He said:—"I apprehend that "nothing can be more certain than this, that the doctrine of equi-"table estoppel by representation is a wholly different thing from "contract, or promise, or equitable assignment, or anything of that "sort;" and after pointing out that a representation, to effect an estoppel, must be a representation as to an existing fact, and would not effect an estoppel if it were merely as to the representor's intentions, he proceeded to point out that in this case there had been no representation as to a fact; "for," said he, "the only representa-"tion which would have produced an estoppel would have "been a representation that the New Orleans Bank had con-"stituted a trust of funds belonging to that Bank, but that in the "hands of the Bank of Liverpool, by which the Liverpool Bank "might be bound, as trustee, to apply those funds in payment of "the bills. The statement which had been made amounted to no-[*285] "thing further than a statement *that there were funds in "the hands of the Liverpool Bank sufficient to pay the bills."

On the question of equitable assignment, he was of opinion that there had been no contract to specifically appropriate the funds in the hands of the Bank of Liverpool to meet the bills.

The case of *Morgan* v. *Larivière* (*r*), in 1875, decided that a letter of credit does not amount to an equitable assignment of the sum mentioned.

In *Ex parte Gomez, In re Yglesias* (*s*), in 1875, the course of dealing was for Gomez, of Malaga, to draw on Yglesias, of London, sending him remittances as security. Yglesias stopped payment. A receiver was appointed, and a composition was agreed to and accepted, which, it was not disputed, was binding on all the creditors of Yglesias, including the bill holders; Yglesias' estate was therefore freed from any further claims by them. The Court held that the contract on which the securities had been deposited was a contract of indemnity, and therefore, that the receiver must return the securities to Gomez after deducting the composition.

The case of *In re Entwistle, Ex parte Arbuthnot* (*t*), in the Court of Appeal in 1876, is very similar to *Robey's Case* (*u*). A firm in

(*r*) *Morgan* v. *Larivière*, 7 E. & I. Ap. 423; 44 L. J. Ch. 457.
(*s*) *Ex parte Gomez, In re Yglesias*, 10 Ch. Ap. 639; see also *Latham* v. *Chartered Bank of India*, L. R. 17 Eq. 205.
(*t*) *In re Entwistle, Ex parte Arbuthnot*, 3 Ch. D. 477.
(*u*) *Robey's Perseverance Works* v. *Ollier*, 7 Ch. App. 695.

India were in the habit of selling cotton to Entwistle of London. They drew on Entwistle, sending the drafts and bills of lading to their London agents, who presented the drafts to Entwistle for his acceptance, giving him the bills of lading. Entwistle had accepted the drafts drawn in respect of the cotton in question, and had received the bill of lading, and pledged it with a firm of cotton brokers. Entwistle stopped payment, indebted to the brokers, who sold the cotton, and, after bringing the proceeds into account, paid the balance to Entwistle's trustee, without prejudice to the vendors' claim. The vendors claimed it on the ground that the cotton had been specifically appropriated to meet their *bills. On the [*286] face of the drafts were the words "pay, &c., and place the same to account cotton shipments as advised." Both the Indian firm and their London agents and Entwistle had written off the drafts as drawn on account of or against the cotton in question. The Court of Appeal held that there was no equitable assignment, and indeed it seems as if the expressions used were little more than the means adopted for identifying the drafts. Entwistle was a purchaser, and could do what he pleased with the cotton. The contract was nothing more than one by which he undertook to pay a debt, stated by both parties to have been incurred in respect of certain cotton.

In *Ex parte Banner, In re Tappenbeck* (*x*), in 1876, before the Court of Appeal, Christiansen and Co. of Para, were the agents of Tappenbeck and Co. of Liverpool, and in that capacity they purchased goods at Para, and consigned them to Tappenbeck and Co. They raised funds for this purpose by drawing on Tappenbeck and Co. and selling the drafts. Christiansen and Co., sent the bills of lading and invoices direct to Tappenbeck and Co., and directed them to place the invoice price of the goods to their credit, and the bills out of the proceeds of which the goods had been purchased, to their debit, in the account between them. Both firms became insolvent, and a consignment of india-rubber, which was on its way, was not stopped *in transitu*, and was taken possession of by the trustee of Tappenbeck and Co. The holders of the bills now sought to have that consignment appropriated to their bills. The Court after deciding that the property in the india-rubber had passed to the trustee, held that the bill holders were not entitled to the proceeds of the india-rubber. Mellish, L. J., delivering the judgment of the Court, which is one of very great value, pointed out the distinction between a principal consigning goods to his agent for sale, and an agent consigning goods to his principal, and continued, "When a principal consigns goods to his agent for sale, "the goods in the hands of the agent remain the *property [*287] "of the principal, subject to any charge which the agent may have "on them; and if the principal draws bills upon the agent specifi- "cally against the goods, that gives the agent the right to apply the

(*x*) *Ex parte Banner, In re Tappenbeck*, 2 Ch. D. 278; 45 L. J. Bank. 73.

"proceeds of the goods when sold in payment of the bills; but "subject to that charge the goods, and the proceeds of the goods, "remain the property of the principal. Where, however, an agent "in one country purchases goods on account of his principal, and "consigns them to him in another country, if the agent allows the "property in the goods and the possession of the goods to pass to "his principal, the goods become the absolute property of the prin-"cipal, and the agent, in the absence of an express agreement to "the contrary, has no lien or charge upon them in the hands of his "principal. Nor does it, in our opinion, in the absence of fraud, "make any difference that the agent draws a bill upon his principal "for the express purpose of obtaining payment of the price of the "goods, and that the principal refuses to accept the bill unless the "agent has taken the precaution of making the goods by the bill "of lading deliverable to his own order, and has transmitted the bill of "lading to an agent of his own, with directions not to hand it over "to the principal unless the bill of exchange is accepted. We "think that the right of an agent in such a case over the goods, as "against his principal, is the same as that of a vendor as against a "purchaser. If the agent gives credit to the principal and trans-"fers the property in the goods and the right to obtain possession "of the goods by means of the bill of lading to his principal, and "fails to stop the goods *in transitu*, the trustee of the principal, in "the event of his bankruptcy, is entitled to the goods. * * *
"Lastly, we have to consider whether there is sufficient evidence of "Christiansen and Co. having a valid charge upon the goods after "they had come into the possession of Tappenbeck and Co.; and "having a right to have the proceeds of the goods applied to the "payment of the bills. It was contended for the respondent that "every person who consigns goods to another has a right to give [*288] "directions how the goods are *to be disposed of, and that a "consignee to whom such directions are given must dispose of the "goods in the way directed or else return them. We admit that "this is true as a general rule, and that the case of *Tooke* v. *Hol-"lingworth* (*y*) is an instance of the application of it. The question, "however, is, did Christiansen and Co. give any directions to Tap-"penbeck and Co. that they were to sell the goods and were to "apply the proceeds in payment of the bills of exchange? We "think that the argument that they did, depends entirely upon a "confusion between a direction to deal with the proceeds of goods, "that is to say, the sum to be realised by the sale of the goods by the "consignee in a particular way, and a direction to deal with the in-"voice price of the goods, that is to say, the price at which the "goods are sold by the consignor to the consignee in a particular "way. Where the consignor directs the consignee to apply the "proceeds of the goods in a particular way the consignor still

(*y*) *Tooke* v. *Hollingworth*, 5 T. R. 215, *ante*, p. 275.

"remains the owner of the goods, and if he directs the proceeds to "be carried to his credit in a particular account, and the bills to be "placed to his debit in the same account, that may amount to a di-"rection to apply the proceeds of the bills in taking up the bills of "exchange. Where, however, a consignor sells goods to a con-"signee and directs him to carry the invoice price of the goods, "that is, the debt due from the consignee to the consignor for the "price of the goods to a particular account, that does not involve a "direction to deal with the goods themselves or the proceeds of the "goods in any particular way. On the contrary it admits that the "goods themselves are the property of the consignee, and if the "invoice price of the goods is placed on one side of an account to "the credit of the consignor, and the bills of exchange drawn in "respect of the price of the goods are placed on the other side of "the account, the only effect is, that when the bills of exchange are "paid by the consignee, the debt due to the consignor for the price "of the goods is discharged, but no *charge on the goods in [*289] "favour of the consignor is thereby created" (*z*).

In *Ranken* v. *Alfaro* (*a*), in 1877, Y. Alfaro of Costa Rica, consigned coffee to Moses Levy and Co., of London, and in his letter advising them of the consignment, he enclosed a letter of recommendation from Eley Alfaro and Co., authorising him to draw on them, and stated that he had drawn on them on the strength of it. He also stated that Eley Alfaro and Co. had a share in this transaction. Two of the drafts came into the possession of the plaintiffs as holders for value. Moses Levy and Co. refused to accept them when presented. When Y. Alfaro heard this, he wrote to Schwartz of London, instructing him to obtain possession of the coffee from Moses Levy and Co., and to sell and honour the drafts with the proceeds. The day before the bills were due, Schwartz wrote to the holders in reference to their bills saying that he expected to receive delivery of the coffee "sent by the drawer against the above," *i. e.*, the bills. He again wrote to the holders saying that he had obtained the warrants for the coffee from Moses Levy and Co., and would dispose of the same as "instructed by sender." Moses Levy and Co. appear to have had some claim against Eley Alfaro and Co., and served Schwartz with an attachment of all goods and moneys belonging to Y. Alfaro. The plaintiffs thereupon filed a bill against Y. Alfaro, Schwartz, and Moses Levy and Co., praying that it might be declared that the coffee had been specifically appropriated to their bills, and that they were consequently entitled to the proceeds in priority to the other parties and the Court of Appeal held that this was so.

In *Duncan, Fox & Co.* v. *North & South Wales Bank* (*b*), in 1879,

(*z*) See also for consignments from principal to agent, *The New Zealand Co.* v. *Watson*, 7 Q. B. D. 374.

(*a*) *Ranken* v. *Alfaro*, 5 Ch. D. 786; 46 L. J. Ch. 832.

(*b*) *Duncan, Fox & Co.* v. *North and South Wales Bank*, 11 Ch. D. 88; 48 L. J. Ch. 376.

Duncan, Fox and Co. had sold to Radford and Co. through Maxwell, a broker, certain corn. Radford and Co. accepted bills for [*290] the price, drawn on them by Maxwell, and *Duncan, Fox and Co. discounted them with the bank. Radford and Co. became insolvent, and Duncan, Fox and Co. were liable on the bills as indorsers. Radford and Co. had deposited security with the bank to secure any balance which might be owing by them to the bank. This deposit was made before the purchase of the corn, and Duncan, Fox & Co. were not aware of it. It was argued for Duncan, Fox and Co. that they were in the position of sureties for Radford and Co. to the bank, and were therefore entitled to have the securities applied to meet the bills. But the Court of Appeal held that they were not so entitled, for although an indorser is a surety for some purposes he is not so for all.

In the case of *In re the Gothenburg Commercial Company, Limited* (*c*), in 1881, that company in London had been in the habit of accepting bills drawn on it by a Swedish bank. The Swedish bank from time to time transmitted securities to cover the drafts. The company, as was well known to the bank, frequently realised the securities, and charged themselves with interest on the proceeds from the date when they were realised up to the time when they were required to meet the acceptances. The company became insolvent, having discounted some of the remittances, and having the rest of them in hand. The Court, consisting of Jessel, M.R., Brett, and Cotton, L.JJ., seems to have been very strongly influenced by the consideration that interest was paid by the company, on the ground that a man would only pay interest for money when he had a right to make use of it, and the right to make use of it as he likes is inconsistent with his holding it as trustee for a certain purpose, and held that the bank were only entitled to have the securities in hand appropriated to their bills (*d*).

This case was followed in the case of *In re Broad, ex parte Neck* (*e*), in 1884. There the course of business between Thomsen in Swenden and Neck a banker in London was for Thomsen to draw [*291] on Neck, and to remit bill to cover the *drafts as they matured. Sometimes Neck kept the remitted bills until they became due, and sometimes he discounted them, and in the account between him and Thomsen, he credited Thomsen with the proceeds of the remitted bills, and debited him with the amount of his acceptances, interest being both allowed and charged, with an annual settlement. Thomsen drew on Neck, and subsequently remitted to him as cover a draft at sight on Westenholz Brothers, which was accepted by them, and handed by Neck to his bankers and paid at maturity. Neck became insolvent, and the Court of Appeal held that Neck had ceased to hold as trustee, and had become a mere debtor. The

(*c*) *In re Gothenburg Commercial Co., Limited*, 29 W. R. 358.
(*d*) See *Banco de Lima* v. *Anglo Peruvian Bank*, 8 Ch. D. 160.
(*e*) *In re Broad, Ex parte Neck*, 13 Q. B. D. 740.

Court, as in the former case, seems to have been very much influenced by the payment of interest on the proceeds. But it does seem at least possible that as the settlements were annual, this arrangement about interest may have been made for convenience in keeping the accounts. However, this point seems to have been taken in the former case.

In *Phelps, Stokes & Co. Comber* (*f*), before V.-C. Bacon, in 1884, Borland of New York acted as the agent of two firms, one at Liverpool and the other at Pernambuco. C. C. Johnson was the sole partner of the Liverpool firm and a partner with the defendant in the Pernambuco firm. At C. C. Johnson's request, Borland purchased goods in New York, and consigned them to the Pernambuco firm, sending the bills of lading to the Pernambuco firm, and drawing bills on the Liverpool firm, which were indorsed to the plaintiffs, but which were subsequently dishonoured when presented to the Liverpool firm for acceptance. The peculiarity of these bills was that there was a counterfoil attached to each draft, addressed to the Liverpool firm, which informed them that the drafts were drawn against those consignments. The Liverpool firm became insolvent and indebted to the Pernambuco firm, which asserted a right to retain the proceeds. The plaintiffs claimed to have the bills paid out of the proceeds, and were unsuccessful. There seems not to have been a *vestige of evidence of any contract by either [*292] firm so to pay them.

In *Ex parte Dever, in re Suse* (*g*), in 1884, Sentance was a merchant at Shanghae, Mussett was a merchant in London, and Suse and Sibeth were bankers in London. Sentance had drawn bills on Suse and Sibeth, remitting them tea, and had discounted them with the Hong Kong Bank; the question was whether the tea was specifically appropriated to meet the bills.

Mussett and Sentance had been in the habit of doing business together, and Mussett requested Suse and Sibeth to grant a credit to Sentance. Suse and Sibeth then wrote a letter of credit to Sentance, authorizing him to draw on them, the drafts to be accompanied by bills of lading, "these documents to be surrendered "to us against our acceptances." Under this credit Sentance made various consignments to Mussett, drawing on Suse and Sibeth in respect of each particular consignment. On each draft there was a statement that it was drawn under the letter of credit, and was to be placed to account of the particular consignment as per shipping documents therewith. Sentance discounted all the bills with the bills of lading attached, with the Hong Kong and Shanghae bank, showing them the letter of credit. When the bills arrived in London they were accepted by Suse and Sibeth, and the bills of lading were delivered to them. The tea was warehoused on arrival, and

(*f*) *Phelps, Stokes & Co.* v. *Comber*, 26 Ch. D. 755; 53 L. J. Ch. 1134, affirmed in the Court of Appeal.

(*g*) *Ex parte Dever, in re Suse*, 13 Q. B. D. 766.

the freight was paid by Suse and Sibeth and debited to Mussett in their account with him. As the tea was sold from day to day, Mussett sent a cheque for the amount sold to Suse and Sibeth, who gave Musset a delivery order. Mussett did not, when paying his cheque, state that it was against any particular acceptance of Suse and Sibeth's. Suse and Sibeth became insolvent, and at that time part of the tea had been sold and part remained in the warehouse. The Court of Appeal held that Sentance was entitled to have the unsold tea appropriated to the drafts, but not the proceeds of that which had [*293] been sold. And, *further that the bill holders had no rights against the goods, but were mere creditors (*h*).

Secondly: The assignment of an equitable interest.

In the leading case of *Burn* v. *Carvalho* (*i*), in 1839, the facts are set out so perspiciously in the judgment of Lord Cottenham, L.C., that the judgment is given verbatim. "Fortunato, who carried on business at Liverpool, had been in the habit of consigning goods for sale to Rego, at Bahia, and of drawing upon him for the expected proceeds; and, for the purpose of realizing, in this country, the amount of the bills so drawn, he employed the firm now represented by the plaintiffs to negotiate these bills; in order to effect which, they indorsed them, and, having disposed of them, placed the amount to the credit of Fortunato, for which he drew upon them. Burn and Co." (the firm represented by the plaintiffs), "having heard that some of these had been refused acceptance by Rego, and, therefore, expecting that such bills, and the others they had so indorsed, would be returned to them and payment required of them, applied to Fortunato, in a letter dated the 4th of April, 1829, requesting him to write to Rego, by the first vessel, with orders, that in case he did not pay the drafts, he would immediately hand over such property as he might have of Fortunato's of an equivalent value to the bills not paid by him, to their agent, Mr. Vogeler" (also at Bahia), "whom they requested to pay the bills for their honor. In answer to this letter, Fortunato, in a letter to Burn and Co, dated the 9th of April, 1829, said, 'Agreeably to your injunction, I will write to Mr. Rego per brig 'Wavertree,' to sail on the 12th of this month, directing him 'to hand over to Mr. Vogeler property of mine in his hands to cover the amount of bills that eventually may not be paid;' and accordingly, by a letter to Mr. Rego, dated the 11th of April, 1829, he gave the directions to him as follows:—'I have engaged and made [*294] 'promise to Messrs. *Burn and Co., that you should pass 'into the hands of their agent in your city, Mr. Vogeler, all the 'property which might exist in your hands on my account.' By a letter of the 11th of June, 1829, Mr. Rego informed Messrs. Burn (after stating that great part of the goods which Fortunato had

(*h*) See further on this subject, *In re Pavy's Patent Felted Co.*, 1 Ch. D. 361; *Johnson* v. *Robarts*, 10 Ch. Ap. 505.

(*i*) *Burn* v. *Carvalho*, 4 My. & Cr. 690.

"consigned to him remained in his possession) that he would de-
"liver such goods to Mr. Vogeler, in consequence of the order so
"to do which he had received from Fortunato.

"On the 30th of June, 1829, the goods in question were accord-
"ingly delivered over by Mr. Rego to Mr. Vogeler, and were after-
"wards sold by him, but did not produce sufficient to meet the bills
"which Messrs. Burn had so endorsed; but, after applying such
"proceeds, they remained creditors of Fortunato, upon that ac-
"count, to a considerable amount.

"On the 23rd of June, 1829, a commission of bankrupt issued
"against Fortunato; and he was found bankrupt upon an act of
"bankruptcy on the 23rd of May preceding; * * *.

"It was admitted there was not a possibility of informing Mr.
"Rego of the letter of the 9th of April, 1829, before the act of
"bankruptcy on the 23rd of May.

"The result of this state of facts, which I have taken from the
"admissions, is that Fortunato, being under pecuniary obligations
"to the plaintiffs, and having property in the hands of Rego, his
"agent, promised and agreed to apply such property, or a sufficient
"part of it, to the discharge of such liability, and sent directions
"to Rego for that purpose, but became bankrupt before such in-
"structions did or could have reached Rego; and the question is
"whether such promise and agreement did not give to the plaintiffs
"a right in equity to have such property so applied, notwithstand-
"ing the intermediate bankruptcy of Fortunato; and the inquiry
"is, first, whether the plaintiffs acquired any such right against
"Fortunato? secondly, if they did, whether such right can be en-
"forced against his assignees? * * *.

"In equity, an order given by a debtor to his creditor upon
"*a third person having funds of the debtor, to pay the [*295]
"creditor out of such funds, is a binding equitable assignment of
"so much of the fund. * * * Here there is an existing fund in an
"agent's hand, and there is a distinct contract to discharge the lia-
"bility out of that fund, and to give directions for that purpose. I
"I think, therefore, that the letters of the 4th and 9th of April,
"1829, amounted to an equitable assignment of the funds in the
"hands of Rego; and, if so, how can the subsequent bankruptcy in
"June, upon an act of bankruptcy in May, destroy the effect of
"such equitable assignment? The property in the hands of the
"assignees was certainly liable to this equity, unless some provision
"in the bankrupt Acts interfere to prevent it. * * * I am, there-
"fore, of opinion that the plaintiffs had a good title, in equity, to
"the goods delivered by Rego to Vogeler (*k*).

(*k*) See also *Malcolm* v. *Scott*, in 1849, 3 Mac. & G. 29; *Pariente* v. *Lubbock*, in 1855; 20 Beave. 588; *Holroyd* v. *Griffiths*, in 1856; 3 Drew. 428; *Acraman* v. *Bates*, in 1860, 2 E. & E. 456; 29 L. J. Q. B. 78; *Elkin* v. *Baker*, in 1862, 11 C. B. N. S. 526; 31 L. J. C. P. 177; *Shand* v. *Du Buisson*, in 1874, L. R. 18 Eq. 283; 43 L. J. Ch. 508.

In *Rodick* v. *Gandell* (*l*), in 1849, certain Railway Companies owed money to the defendants, who were their engineers. The defendants owed money to their bankers, who were the plaintiffs. The defendants wrote to the solicitors of the Railway Companies authorizing them to receive the monies, and asking them to pay the money when received to the plaintiffs. The solicitors then wrote to the plaintiffs, telling them what their instructions were. The solicitors received the money but paid it to the defendants. There was no direction given by the defendants to the Railway Companies to pay the money to the plaintiffs, nor was any agreement proved between the defendants and the plaintiffs. Lord Langdale, M.R., held that there was no equitable assignment. He said (*m*), "It seems difficult to ascertain the grounds, on which the authority given to [*296] "a person, who has *no interest, to receive, and the promise "of the same person to pay when received, can be said to constitute an equitable assignment;" and he pointed out on the following page that this was not inconsistent with the solicitors being held liable at law on their promise. This judgment was affirmed by Lord Chancellor Truro (*n*).

The facts of this case appear to amount to nothing more than this. The defendant says to one who was his agent for this purpose, "When certain money is paid to you, you are to pay it to the "plaintiffs." The agent then says to the plaintiffs, "My instructions are to pay the money to you as soon as I get it." There was no contract between the defendant and the plaintiff, and there was no reason why the defendant should not withdraw his instructions.

In *Burn* v. *Carvalho* (*o*), Fortunato's own letter stated that he had made a promise to Burn and Co.

The case of *Hoare* v. *Dresser* (*p*), in the House of Lords, in 1859, was one of some complication. The same cargoes had been assigned in equity to both the plaintiffs and the defendant, and the real question was whether the plaintiffs at the date of the assignment to them had notice of the assignment to the defendant.

Dresser, of London, had contracted with Norrbom, a timber merchant in Sweden, to sell three cargoes of timber which Norrbom was to consign to him from Sweden. Norrbom wrote to Dresser, saying he had received two charter parties for two of the cargoes and hoped to get the third, and that the cargoes would have to be paid for shortly, and asked leave to draw on Dresser for 1,000*l.* To this Dresser assented, and Norrbom then wrote enclosing copies of charter parties of two vessels, the 'Verene' and the 'Christiana' (on board of which two of the cargoes were afterwards shipped),

(*l*) *Rodick* v. *Gandell*, 12 Beav. 325; on ap. 1 De G. M. & G. 763.
(*m*) Page 337.
(*n*) *Rodick* v. *Gandell*, 1 De G. M. & G. 763.
(*o*) *Burn* v. *Carvalho*, 4 My. & Cr. 690.
(*p*) *Hoare* v. *Dresser*, 7 H. L. 290; 28 L. J. Ch. 611.

and saying that he had authorized a Mr. Frestadius to draw on him for 500*l.* Dresser accepted Frestadius' draft for 500*l.* and paid it at maturity, and he subsequently accepted and *paid another [*297] of Frestadius' drafts for 500*l.* On the 29th September, Norrbom again wrote to Dresser stating that he expected to receive by the next post the bills of lading of the 'Verene' and 'Christiana,' and that the captains of two other vessels would complete their loadings next week, and that in a few posts he would send the shipping documents of all four cargoes.

On the 24th October, Hoare and Co., the plaintiffs, received a letter from Norrbom, in which they were requested by him to deliver to Dresser the charter parties of the 'Irene' and 'Christiana,' and bills of lading endorsed in blank (all of which were enclosed) as soon as Dresser should accept a draft for 1,312*l.* (also enclosed), and should make an acknowledgment that Norrbom had performed his contract in all respects. The letter also stated that he (Norrbom) had authorized Frestadius to draw on them for 1,300*l.* This letter from Norrbom to Hoare and Co. was sent through Kleman, who was Hoare's agent in Sweden, Kleman enclosing it in a letter of his own to them, in which he said, referring to Norrbom's authority to Frestadius to draw for 1,300*l.*, that, "knowing Dresser "and Co., to be very good, I have not hesitated to assure Mr. "Frestadius that you will promptly honour his draft." Two days previously to this Hoare and Co. had received Frestadius' drafts on them for 1,300*l.*

On the receipt of Norrbom's letter and shipping documents on the 24th, Hoare and Co. sent a clerk to Dresser, who presented the draft for acceptance, and informed him of the contents of Norrbom's letter. Dresser was annoyed and declined to accept the draft, saying the proceeding was a strange one, as the cargoes were already his, and that he had made advances to Norrbom in respect of them, and that it was a swindle. Hoare and Co. then wrote to Dresser on the 24th, posting the letter at 11.30, which Dresser received between 12 and 2 o'clock, in which they stated explicitly the conditions on which the bills of lading would be delivered to him. In answer to this, Dresser on the same afternoon wrote that he wished to see the bills of lading, and would return them if he did not accept the bill and make the other *acknowledgments, and on [*298] the faith of this Hoare and Co. delivered them to him on the afternoon of the 24th. And in the evening of the same day they wrote to Frestadius "We also give your drafts due protection," and posted the letter the same evening. Frestadius' drafts were subsequently accepted. On the 25th Dresser accepted the draft for 1,312*l.*, and returned it to Hoare and Co., but kept the bills of lading without making the required acknowledgments. He subsequently paid the draft at maturity. Hoare and Co. requested Dresser either to give his acknowledgments or to take back his acceptance and return the bills of lading.

It was argued for Dresser that there had been an equitable assignment to him of the cargoes of the 'Verene' and 'Christiana,' and then when Hoare and Co. came under a liability in respect of the bills of lading for those cargoes, that they had notice of Dresser's prior equitable title. The case really turned on the second point, the House of Lords being of opinion that Hoare and Co. had not notice of Dresser's claim, even assuming it to have existed, but the case is important, as showing what the judges considered to be an equitable assignment. Lord Chelmsford, L C., said, "When the "'Verene' and 'Christiana' were laden with timber expressly for "the purpose of satisfying the contracts which had been entered "into on account of Norrbom for the supply of exact quantities "shipped for Bristol and for London, Dresser had an equitable "title to the property in these cargoes which he could enforce "against Norrbom, or against any other person claiming from Norr-"bom with no better title than he possessed."

"And," said Lord Wensleydale, "I take it to be perfectly clear "that in order to create an equitable assignment the obligation "must be to deliver a particular chattel, not to deliver any chattel. "* * * But in this case, though the contract was, I think, uncer-"tain till the 29th September, there was a positive engagement that "the bill of lading of these two cargoes which had been put on "board the 'Verene' and 'Christiana' should be transferred to Dres-[*299] "ser, and though Dresser refused to accept the particular *bill "that was drawn upon him, I think it may be well considered as "an appropriation of those two cargoes to him, which would con-"stitute an equitable lien on them in his favour."

In *Frith* v. *Forbes* (*q*), in 1862, which has been considered at greater length, *ante*, p. 278, there was an assignment of the debt, but the pinch was, was it assigned free from equities. For the determination of this point there was the subsidiary question, were the securities specifically appropriated? Lord Justice Turner, put the case in this way: "The bills * * * refer to the consignments, "and operate, I think, as orders by Begbie and Co. on Forbes and "Co. to pay the bills out of those consignments, and the present-"ment of the bills by the plaintiffs was a communication to Forbes "and Co. of those orders" (*r*). Begbies had assigned to Frith a debt which was owing to Begbies from Forbes. Begbies then became insolvent. Now this being an equitable assignment, the assignor could only assign it subject to any equities affecting it and it was argued for Forbes that one of these equities was his lien over the proceeds in respect of Begbie's general indebtedness to him. But the Lords Justices held that Forbes, by accepting the cargo in trust to pay the debt out of the proceeds, had renounced his lien over those proceeds, and therefore could not now assert it.

(*q*) *Frith* v. *Forbes*, 31 L. J. Ch. 793; 4 De G. F. & J. 409.
(*r*) See also the concluding sentence of his judgment.

It must not be forgotton that this case was a peculiar one, and that it was a case of a principal consigning goods to his agent, and not that of a vendor consigning to a purchaser (*s*). The plaintiff's title was also good against Begbie, and his assignee could not be in a better position.

In the case of *Holroyd* v. *Marshall* (*t*), in the House of Lords in 1862, Taylor, who was the occupier of a mill, covenanted that he would assign to Holroyd, his landlord, all machinery which might thereafter be brought by him (Taylor) *into the mill. The [*300] sheriff seized the machinery which Taylor had so brought in, and Holroyd claimed it as equitable assignee. The House of Lords held that he was entitled to it. Lord Westbury said, "* * * It is "quite true that a deed which professes to convey property which "is not in existence at the time is, as a conveyance, void at law, "simply because there is nothing to convey (*u*). So in equity a "contract which engages to transfer property, which is not in exis-"tence, cannot operate as an immediate alienation merely be-"cause there is nothing to transfer. But if the vendor or mort-"gagor agrees to sell or mortgage property real or personal of "which he is not possessed at the time, and he receives con-"sideration for the contract and afterwards becomes possessed "of property answering the description in the contract, there is "no doubt that a court of equity would compel him to perform "the contract, and that the contract would in equity transfer "the beneficial interest to the mortgagee immediately on the "property being acquired. This of course *assumes that the sup-"posed contract is one of the class which a court of equity "would decree a specific performance.* * * * It follows that, "immediately on the new machinery and effects being fixed or "placed in the mill, they became subject to the operation of the "contract, and passed in equity to the mortgagees, to whom Taylor "was bound to make a legal conveyance, and for whom he, in the "meantime, was a trustee of the property in question" (*x*).

The case of *Reeve* v. *Whitmore* (*y*), in 1863, is introduced here, as in it an attempt was made to give to a mere license to seize after-acquired property the same effect as a covenant to assign after-acquired property, so as to create an equitable interest in such property. Lord Westbury, L. C., said, "A power is a very different "thing from an interest; and if the extent and limit of the contract "be merely that he should *have such a power, then an inter- [*301]

(*s*) See *per* James, L. J., in *In re Entwistle*, 3 Ch. D. 480; and in *Robey* v. *Ollier*, 7 Ch. Ap. 695.

(*t*) *Holroyd* v. *Marshall*, 10 H. L. R. 191; 33 L. J. Ch. 193.

(*u*) Even if the contract is in form an absolute assignment, yet it merely operates as a promise to assign until the contract attaches upon specific goods, *Collyer* v. *Isaacs*, in 1881, 19 Ch. D. 351; 51 L. J. Ch. 14.

(*x*) See also *Mogg* v. *Baker*, in 1838, 3 M. & W. 195.

(*y*) *Reeve* v. *Whitmore*, 33 L. J. Ch. 66.

"est would not arise under the power till the power was exercised" (*z*).

In *Gurnell* v. *Gardner* (*a*), in 1863, Gledhill, who was in debt to the plaintiff, had contracted to purchase some wool from Bradley, but had not paid the whole of the price. The wool was lying at Doncaster, on the defendant's premises. In order to secure the money owing to the plaintiff, Gledhill said to him, "There is "the wool which has gone to Doncaster; go and sell that wool; "pay Bradley the balance due to him on such wool, and keep the remainder yourself." Gledhill died shortly afterwards. The plaintiff accordingly went to Doncaster and demanded possession, but was informed by the defendant that he had been instructed by Gledhill's administrators not to deliver it. The plaintiff, however, by force obtained possession, and sold the wool; he then paid Bradley the sum owing to him, and kept the balance. The defendant and the administrators commenced an action to recover the value of the wool, and the plaintiff, having no defence at law, suffered judgment to be entered against him, and then filed his bill to have it declared that he was in equity entitled to the proceeds of the wool. V.-C. Stuart held that there had been a good equitable assignment. It is worth noting that there was no evidence in writing of the equitable assignment.

In *Langton* v. *Waring* (*b*), in 1865, the plaintiffs were the assignees in bankruptcy of Hollway, Hart and Co., who had contracted to sell a large number of railway sleepers to the defendants. The cargoes, as they arrived from Dantzic, were discharged at Hollway, Hart and Co.'s wharf, and the timber, which was double the size of a railway sleeper, was sawn in two and then delivered at the defendant's wharf, about half a mile distant. The question arose as to the last cargo. John Hart, who was one of the firm of Hollway, Hart and Co., called on the defendants to ask them for an advance, and at the interview, as appeared from the evidence, an ad- [*302] vance of *600*l.* was made to him on account of this last cargo. He then absconded, and some days afterwards the defendants sent a large number of men, and, against the consent of Hollway, Hart and Co., carried away the timber. Part of the timber had been sawn into sleepers; part had not.

The plaintiffs, who were the assignees of Hollway, Hart and Co., brought this action to recover the value of the timber. The Court held that they were not entitled, there having been a good equitable assignment to the defendants.

Erle, C. J., said, "My judgment rests entirely upon what passed "at the time that advance was made. It was agreed on all hands "that it was an advance made specifically on account of the timber "in question. The assignees now claim to keep both the money

(*z*) *Thompson* v. *Cohen*, L. R. 7 Q. B. 532; 41 L. J. Q. B. 221.
(*a*) *Gurnell* v. *Gardner*, 9 Jur. N. S. 1220; 4 Giff. 626.
(*b*) *Langton* v. *Waring*, 18 C. B. N. S. 315.

" and the goods. The question is, whether, as against them, what " passed between the defendants and John Hart at the time of mak- " ing that advance did not constitute that 600*l.* a charge upon the " timber, and make it an advance upon the security of that specific " cargo, so as to prevent the assignees, who take all the legal and " equitable rights of the bankrupts, from being entitled to claim it. " I am of opinion that what passed upon that occasion did amount " to an agreement on the part of John Hart to appropriate this par- " ticular timber as a security for the advance he was asking" (*c*).

In re Agra and Masterman's Bank, Ex parte Asiatic Banking Corporation (*d*), in 1867, the question was whether the debt had been assigned subject to equities. There Agra and Masterman's Bank had written a letter authorizing Dickson, Tatham and Co., to draw on them for a certain amount, and the letter contained these words, "This credit will remain in force for twelve months from this date, and parties negotiating bills under it are requested to indorse particulars on the back hereof." Dickson, Tatham and Co., drew on Agra and Masterman's Bank, and sold the bills to the Asiatic *Banking Corporation, who indorsed the particulars as [*303] above requested, and now, as holders, claimed on Agra and Masterman's Bank, who resisted the claim on the ground that Dickson, Tatham and Co. were indebted to them to an amount greater than the bills. But the Court allowed the claim, on the grounds that the letter was addressed to the persons who should negotiate the bills: and that it was a representation to such persons that the bills would be paid. The judgment of Lord Cairns contains the following passage (*e*) :—

" But presuming the contract to have been at law a contract with " Dickson, Tatham and Co., and with no other, it is clear that the " contract was in equity assignable, and that Dickson, Tatham and " Co. must be taken to have assigned (if assignment were needed) " to the Asiatic Banking Corporation, and to have been by the " writers of the letter intended to assign to them the engagement " in the letter providing for the acceptance of the bills. Generally " speaking, a chose in action, assignable only in equity, must be as- " signed subject to the equities exisiting between the original par- " ties to the contract; but this is a rule which must yield when it " appears from the nature or terms of the contract that it must have " been intended to be assignable free from and unaffected by such " equities. The essence of this letter is, as it seems to me, that the " person taking bills on the faith of it is to have the absolute bene- " fit of the undertaking in the letter, and to have it in order to ob- " tain the acceptance of the bills which are negotiable according to

(*c*) See also *Bishop* v. *Crawshay*, in 1824, 3 B. & C. 418.

(*d*) *In re Agra and Masterman's Bank, Ex parte Asiatic Banking Corporation*, 2 Ch. App. 391; 36 L. J. Ch. 222.

(*e*) 2 Ch. App. 397; 36 L. J. Ch. 226.

"their tenor, and without reference to any collateral or cross "claims. Unless this is done the letter is useless."

The third and last question for consideration is the rule in *Ex parte Wariny* (*f*).

Where the securities are admitted to have been deposited in trust to meet the bills, and both the drawer and the acceptor of the bills is insolvent, and the bills are in the hands of third parties, then the difficulty occurs in winding up the estates, which is met by the rule in *Ex parte Waring* (*f*).

[*304] *The facts in *Ex parte Waring* (*g*), which was decided in 1815, were that Bracken and Co., who were manufacturers, had an account with Brickwood and Co., who were bankers, and drew on them from time to time, and deposited securities with Brickwood and Co. to cover their acceptances. The bills had been indorsed to third parties, and both Brickwood and Co. and Bracken and Co. became bankrupt; Lord Eldon ordered (*h*) that the securities should be appropriated specifically to the discharge of the acceptances.

Lord Eldon regarded the case as if the securities had been realized at the moment of the bankruptcy and the proceeds appropriated to meet the bills rateably; if they were not sufficient, the bill holders proving for the unpaid portion; if more than sufficient, the surplus to be paid to the depositors of the security (*i*). It had been argued that the holders of the bills had some right of their own to have the securities appropriated to their bills, but, said Lord Eldon, "I see nothing in this transaction, which, supposing a bank-"ruptcy had not occurred, would entitle those, who are creditors by "the acceptances of the bankers having these deposits, to maintain "an equity upon them: the effect of which would be, that from "the moment of that deposit the bankers became trustees for those "creditors; and could not come to any new arrangement with those "whose debts are to be so discharged."

Lord Eldon then treated the case in this way: Brickwood and Co. became insolvent in July: Bracken and Co. became insolvent in August; between those dates Bracken and Co. had an equity to have the securities appropriated to the bills, and that equity was not varied by their insolvency, and the bill holders must have the benefit of *that* equity.

In *Powles* v. *Hargreaves* (*k*), in 1853, a firm consisting of G. Hargreaves, J. Hargreaves, and Thomas Platt, carried on business at Manchester, Liverpool, and Shanghae. The course of business [*305] between the firm and their customers *was for the firm to

(*f*) *Ex parte Waring*, 19 Ves. Jun. 345; 2 Rose, 182.
(*g*) *Ex parte Waring*, 19 Ves. Jun. 345; 2 Rose, 182.
(*h*) The order in *Ex parte Waring*, is set out at full length in 3 D. G. M. & G. 445.
(*i*) *Per* Lord Blackburn, in 7 App. Ca. 392.
(*k*) *Powles* v. *Hargreaves*, 3 De G. M. & G. 430.

select and purchase goods at Manchester for their customers and to send them to Liverpool, whence they were consigned to the Shanghae branch of the firm, who sold the goods, purchased other goods, and consigned them back to the Liverpool branch. The firm financed these transactions by drawing on their customers for the price of the goods consigned to China, which bills were accepted by the customers, and the agreement between the firm and the customers was that the return consignments purchased in Shanghae and consigned to Liverpool should be a security in the hands of the firm for the bills so drawn.

For the purposes of getting some bills so drawn by the firm on one Prescott and accepted by him, discounted, a member of the firm informed the manager of the Liverpool Banking Company (the plaintiffs) of the circumstances under which the bills were drawn, and the Liverpool Banking Company discounted the bills on the understanding that the return consignments were to be a security for the payment of the bills. Prescott died insolvent, and when the firm failed the Liverpool branch held certain return consignments in their hands. Lord Cranworth, L. C., and L. JJ. Knight Bruce and Turner held that the holders had a right to have the proceeds of those consignments appropriated to meet the bills. It is clear from the judgments that the rule in *Ex parte Waring* (*l*) applies where there is a double insolvency, and is not to be restricted to cases of double bankruptcy.

In the case of *Inman* v. *Clare* (*m*), in 1858, the Klingenders, Liverpool merchants, usually employed the Clares, who were cotton brokers, to sell the cotton which they imported, and, requiring money, they applied to the Clares, who, on having the bills of lading for certain cotton deposited with them as security, accepted Klingenders' drafts, and the drafts were discounted with the plaintiff. Both the Klingenders and the Clares became insolvent, and Vice-Chancellor Wood held that the plaintiff was entitled to have the proceeds of the cotton appropriated to meet his bills.

*In *In re New Zealand Banking Corporation, Hickie and* [*306] *Co.'s Case* (*n*), in 1867, the point was not decided, but Lord Romilly seems to have been of opinion that the rule in *Ex parte Waring* (*o*) did not apply where the drawers had deposited security with their bankers, the acceptors, but were so much in debt to them that they would still have been in their debt if the bankers, after paying the bills out of the securities, had kept the balance; for as nothing would under any circumstances be owing to the drawers, they could have no equity to have the securities applied in one way rather than another. In short, that as the drawers could have no equity, the holders could have none. But inasmuch as the posi-

(*l*) *Ex parte Waring*, 19 Ves. Jun. 345; 2 Rose, 182.
(*m*) *Inman* v. *Clare*, John. 769.
(*n*) *In re New Zealand Banking Corporation*, L. R. 4 Eq. 226; 36 L. J. Ch. 809.
(*o*) *Ex parte Waring*, 19 Ves. Jun. 345; 2 Rose, 182.

tion of the drawer and acceptor was, with respect to these securities, determined by the express terms of the contract of deposit, it is by no means clear that it was correct to say that the drawers had no equity.

In the *City Bank* v. *Luckie* (*p*), in 1870, Kynaston and Co. had agreed to give Luckie a current cash credit which was secured by the mortgage of an estate in Guiana. Kynaston and Luckie became insolvent, and the plaintiffs, as the holders of the bills drawn by Luckie and accepted by Kynaston and Co., sought to have the security appropriated to the bills; and Lord Hatherly, L.C., decreed accordingly.

In the *Bank of Ireland* v. *Perry* (*q*), in 1871, Horne and Co. sold a cargo of maize to Pim and Co.: Pim and Co. sold it to Perry, the defendant, and drew on him on the terms that the bills should be paid out of the proceeds. Perry sold the cargo to Coventry and Shepheard. Coventry and Shepheard pain Horne and Co. direct, and that left in their hands a sum of 415*l.* due from them to Perry for the maize. Both Pim and Co. and Perry were insolvent, and the plaintiffs, as holders of the bills drawn by Pim and Co. on Perry, sought to have the balance in Coventry and Shepheard's hands appropriated to their bills, and the Court of Exchequer allowed their claim.

[*307] *In *Ex parte Smart in re Richardson* (*r*), in 1872, Stephani of Havana purchased goods of Langs of Bremen. Langs drew on Richardson of London, who accepted the bills. Stephani sent security to Richardson to keep him in funds to meet Lang's draft. Stephani and Richardson became insolvent, and Langs, who were the holders of the bills, claimed to have such of the security as was in Richardson's hands at the date of his liquidation, applied to meet their drafts. The claim was resisted on the ground that Stephani were not parties to the bill, and therefore the rule in *Ex parte Waring* (*s*) did not apply. But the Court held that it did, Mellish, L.J., saying that if Stephani had drawn on Richardson, had deposited security with him, and had indorsed the bills to Lang's, then the doctrine would clearly have applied, and it could make no difference that Stephani got Langs to draw for them. The same learned judge explained this case in *Vaughan* v. *Halliday* (*t*), in 1874. He there said: "In *Ex parte Smart* (*r*) the holder was "himself the drawer, and although he was not entitled to prove on "the bill against the two firms, he was entitled to prove against the "acceptor, who had accepted for the accommodation of a firm to "whom the drawer of the bill had sold goods, and he was en-"titled to prove for the same debt against that firm for goods sold

(*p*) *City Bank* v. *Luckie*, 5 Ch. App. 773.
(*q*) *Bank of Ireland* v. *Perry*, L. R. 7 Ex. 14; 41 L. J. Ex. 9.
(*r*) *Ex parte Smart, In re Richardson*, 8 Ch. App. 220; 42 L. J. Bank. 22.
(*s*) *Ex p. Waring*, 19 Vesey, junr., 345; 2 Rose, 182.
(*t*) *Vaughan* v. *Halliday*, 9 Ch. App. 568.

"and delivered. There being therefore a double insolvency and a "double right of proof, we thought that the principle of *Ex parte* "*Waring* (*s*) applied."

In *Vaughan* v. *Halliday* (*t*), in 1874, Ryder and Co. trading in Brazil drew on Ashton, of Manchester, in favour of the plaintiff, the holder, and subsequently purchased bills and forwarded them to Ashton to cover the drafts. Both Ryder and Ashton became insolvent, and Ashton refused to accept the drafts when presented. The Lords Justices held that the rule did not apply, for as Ashton had not accepted, *there was not that right of double proof [*308] which is essential. If the bills were appropriated to the drafts, then as Ashton had not accepted, Ryder had an unqualified right to have them back. If they were not appropriated, there was no case.

In *Ex parte Lambton in re Lindsay* (*u*), in 1875, Lindsay agreed to build a ship for Marshall and Osborne which, was to be paid for by bills drawn from time to time as certain stages of construction were reached, and it was agreed that the ship and materials while in course of construction should belong to Marshall and Osborne. The bills were accepted by Marshall and Osborne, and discounted with Lambton and Co. Before the ship was finished Marshall and Osborne became insolvent and subsequently Lindsay became bankrupt, and Lambton and Co. applied to have the ship appropriated to their bills. But the Court refused the application. Whether the property had passed or not it was not a case where the ship was held as a security to meet the bills; it was not a case of pledge.

In *Ex parte General South American Co., in Re Yglesias and Co.* (*x*), in 1875, the drawer, Madinya of Guayaquil, sent security to the acceptors, Yglesias, of London, to cover drafts which were accepted. The acceptors were insolvent, and a receiver appointed. The drawer was practically insolvent, but retained the management of his affairs having come to an arrangement with his creditors to pay them off by instalments. The holders, the General South American Company, were not parties to this agreement, and sought to have the securities appropriated to their bills. The Court considered that the drawer was not under the control of any Court, and although at the time when he deposited the securities he did give authority to appropriate them, yet he might revoke that authority and give any instructions he thought fit, and the Court had no power to interfere, for the rule can only be *enforced where [*309] both estates are under the control of the Court. James, L.J., said: "No judge has ever expressed an opinion in favour of extending "the rule to a case where one of the parties, though practically in-"solvent, is subject to no jurisdiction and cannot be compelled to

(*u*) *Ex parte Lambton, In re Lindsay*, 10 Ch. App. 405; 44 L. J. Bank. 81.
(*x*) *Ex parte General South American Co., In re Yglesias & Co.*, 10 Ch. App. 635; 45 L. J. Bank. 54.

"submit his rights to any Court * * in my opinion the rule can-
"not be extended to a case where there is a party whose estate is
"not under administration."

The rule in *Ex parte Waring* (*y*), was further considered in the cases in the note (*z*).

The rule in *Ex parte Waring* (*y*) is not applied in the distribution of insolvent estates in Scotland. This was decided by the House of Lords in 1882 in the case of the *Royal Bank of Scotland* v *Commercial Bank of Scotland* (*a*). Ramsay was in the habit of sending yarn to Saunders to be spun, and it was agreed that Saunders should hold the yarn as security for his acceptances of Ramsay's drafts. Both became bankrupt, and the Royal Bank, as holders of the bills, claimed to have the estate of Saunders administered, as it certainly would have been in England, according to the rule in *Ex parte Waring* (*y*). But the Court held that that rule was not the law of Scotland, and followed the system of dividing the assets adopted there, which seems to be a more equitable one. That system may be most easily seen from the figures themselves. The whole of the claims on Saunders' estate amounted to 40,000*l.* of which 24,000*l.* were general creditors, and 16,000*l.* were bill-holders. The assets were 9,000*l.* and the securities 4,000*l.* In dividing the estate the 9,000*l.* were divided rateably, the bill-holders taking sixteen-fortieths, viz. 3,600*l.* The general estate was then indemnified out of the securities, that is to say, the amount paid to the holders, viz. 3,600*l.*, was taken out of the secu-[*310] rities and put into the *general estate. This sum was now divided rateably, the holders again getting sixteen-fortieths of it, viz. about 1,400*l.* The rest of the security was now used as far as it would go to replace the 1,400*l.* taken by the holders, and was then exhausted, but if it had been larger this process of replacement would have gone on again until the whole of the assets, original and replaced, had been divided. The bill-holders would then have gone upon what remained of the security, if anything, for the balance, owing to them, and if there was something remaining over after that, it would have been handed back to the drawer's trustee. The effect of this division is not to increase the amount to which the general creditors are entitled, but merely to indemnify their fund to the amount paid to the holders who should have been paid out of the security.]

(*y*) *Ex parte Waring*, 19 Ves. Jun. 345; 2 Rose, 182.

(*z*) *Banner* v. *Johnson*, in 1871, 5 E. & I. App. 157; 40 L. J. Ch. 730; *Ex parte Dewhurst*, in 1873, 8 Ch. App. 965; 42 L. J. Bank. 87; *In re Barned's Banking Company*, in 1874, L. R. 19 Eq. 1; 10 Ch. App. 198; 44 L. J. Ch. 97 and 494; Loder's Case, L. R. 6 Eq. 491.

(*a*) *Royal Bank of Scotland* v. *Commercial Bank of Scotland*, 7 App. Ca. 366.

*PART III. [*311]

OF THE VENDOR'S RIGHTS.

CHAPTER I.

STOPPAGE IN TRANSITU: ITS ORIGIN. IT IS A RIGHT PECULIAR TO ONE WHO STANDS IN THE SITUATION OF VENDOR, AND WHO IS WHOLLY OR PARTIALLY UNPAID.

It is superfluous to repeat the modern authorities for the position that by a bargain and sale without delivery a legal property passes. But, as has been already more than once intimated, it is not an absolute and unqualified legal property that is transferred: the property passes subject to the unpaid vendor's rights.

And this brings us to the consideration of the difficult and important subject of what are the unpaid vendor's rights.

It is to be observed, that as a general proposition the person who has the property in goods has *primâ facie*, but not necessarily the legal right to the possession of them.

And, in general, he who has the property and legal right to the possession of goods, has in contemplation of law the control over them, though in point of fact the actual holder of the goods may wrongfully refuse to obey his directions; still, as the holder ought to obey, the goods are considered as being in point of law in the possession of the proprietor, and therefore the owner of goods has *primâ facie* all the legal rights and remedies which he would have if the goods were in his own actual possession, or as it is more technically expressed, "It is a rule of law that the property of personal chattels draws to it the possession" (*a*).

*From this it follows that the purchaser under a bargain and [*312] sale has a *primâ facie* right to the possession of the goods; but it is no more than a *primâ facie* right to the possession. The parties may, by the terms of their agreement, bargain that the right of property shall vest in the purchaser forthwith, but that the right of possession shall remain with the vendor until the fulfillment of any conditions they please, and if there is nothing in the circumstances to show a contrary intention, the parties are presumed to intend to make the payment of the price contemporaneous with the delivery of the possession (*b*). If, therefore, nothing be said in the agreement about the time of delivery or payment, the construction put by the law upon the agreement is, that the vendor shall deliver the

(*a*) 2 Saunders, 89, n.
(*b*) *Bloxam* v. *Saunders*, 4 B. & C. 941.

goods upon payment of the price, and the purchaser shall pay the price upon receiving the goods, and either party may at a reasonable time call upon the other to fulfil his part of the bargain, provided he is ready to fulfil his own, but not otherwise: so that neither the vendor can maintain any action against the purchaser for the price without showing a readiness to deliver the goods, nor the purchaser maintain any action founded on the right of possession without showing a readiness to pay the price. But inasmuch as this proceeds on the presumed intention of the parties any thing in the agreement which shows that such is not their intention will alter the construction and legal effect of the agreement.

If, therefore, there is express credit given, and nothing said about the time of delivery, the vendor is bound to deliver the goods in a reasonable time if required, but the buyer is not bound to pay the price before the credit expires, for such is the bargain. During the interval between the vesting of the property and the expiration of the credit, the buyer has the rights of property and possession, though the goods have not been delivered nor paid for, and he may in pleading, and for all legal purposes, be considered as possessed [*313] *of them. But his rights are not indefeasible; and if, before he has obtained possession of the goods, the buyer becomes insolvent, or perhaps if he suffers the time of credit to expire before demanding possession, the unpaid vendor has a right over the goods the precise limits of which are not well ascertained, but which certainly interferes with the purchaser's rights both of property and possession. In this respect, the situation of an unpaid vendor is a peculiar one; for though the owner of goods can by agreement give the holder of them a right to hold them adversely to him till some conditions are fulfilled, or as it is technically called, give him a lien on them: yet this anomalous sort of property springing up upon the insolvency of the owner, seems peculiar to a contract of sale; and there is attached to it a further right to stop the goods in transitu, as it is called, after they have left the vendor's possession and before they have come to that of the buyer, which is equally peculiar to the contract of sale.

We now come to treat of the rights of the unpaid vendor, whilst he still retains possession of the goods sold, and of that extension of his right which enables him to retake the goods after he has parted with the possession, and before the purchaser has taken possession. In the natural order of things, it would be more regular to consider the vendor's rights whilst in possession, before taking any notice of those rights which he possesses after he has parted with it; but the state of the law makes it more convenient to reverse this order, and commence by endeavouring to ascertain the extent and nature of the right of stoppage in transitu. In the first place it is to be observed, that when the vendor has given the buyer possession under the contract of sale, all his rights in the goods are completely gone; he must recover the price exactly as he

would recover any other debt, and has no longer any claims on the goods sold superior to those of any other creditor. The delivery and acceptance of possession complete the sale, and give the buyer the absolute unqualified and indefeasible rights of property and possession in the things sold, though the price be unpaid and the buyer insolvent, unless, indeed, the whole transaction is vitiated by actual *fraud. "In this respect," says Lord Tenterden (*c*), [*314] "the law of England is more favourable to the transfer of property, "the great subject of commerce, and less attentive to the interest "of the seller of goods than the ancient civil law or the modern law "of many European nations, which is chiefly founded on the civil "law: for the civil law did not in general consider the transfer of "property to be complete by sale and delivery alone, without pay-"ment or security for the price, unless the seller agreed to give a "general credit to the buyer for it; but allowed the seller to re-"claim the goods out of the possession of the buyer, as being still "the seller's own property. And by the general law of France in "the case of insolvency, the seller who has sold a thing, and still "lies out of the money which he was to have for it, if he finds the "thing that he sold in the hands of the buyer, may seize on it, and "he is not obliged to share it with the other creditors of the buyer; "whereas, by the general law of England, when goods have been "delivered into the actual or constructive possession of the buyer, "they cannot be reclaimed."

It must be borne in mind, that at the time Lord Tenterden wrote, the *modern* law of most of the continental nations was what is now he *ancient* law of the same countries, for the *Code Napoleon* was not yet introduced. And this is the more important, because the *Code de Commerce* on this point was framed with the avowed and deliberate purpose of abolishing the ancient law of revendication, and adopting the provisions of the law of England and America (*d*). But the distinctions *between the civil law [*315] which enabled the seller after delivery to seize the goods as his property, even in the hands of a *bonâ fide* sub-purchaser, unless

(*c*) Abbott on Shipping, Part IV., Chap. XI., 10th ed., 391.

(*d*) This assertion is made on the authority of a note in 1 *Bell's Commentaries*, p. 207. I have not seen the documents there referred to, but the quotations seem fully to bear out the statement. But the right of revendication seems to remain when the parties are not traders, but the period during which it must be exercised is cut down to a week, and is confined to the case of a sale without giving of credit. Where credit is given, the seller seems to retain a "*privilege*" or preferable claim to that of ordinary creditors, but to have no right of revendication. "The creditors who have a '*privilege*,' on certain moveable are * * * 4thly, The price of moveable goods sold and not yet paid for, if they are still in the hands of the debtor, whether he bought them on credit or without credit (*a terme ou sans terme*). If the sale was made without credit, the seller may even revendicate the goods so long as they are in the hands of the purchaser, and forbid the resale, provided the revendication is made within a week of the delivery, and that the goods remain in the same state in which that delivery was made." *Code Civil*, 2102.

there had been general credit given, express or implied, and the ancient law of France, which gave the right to recover them so long as they were in specie in the hands of an insolvent buyer, whether there was credit given or not, but made that right cease when the goods came into the hands of a sub-purchaser, and the law of England which gives no right of either sort, seem all to have been present to Lord Tenterden's mind when writing these few sentences.

The state of the ancient foreign law is by no means irrelevant to the present inquiry; for there seems but little reason to doubt, that the right of stoppage in transitu is a modification of the right of revendication, such as it had become by the general law merchant during the middle ages.

"Although," said Lord Abinger, in 1841 (*e*), "the question of "stoppage in transitu has been as frequently raised as any other "mercantile question within the last hundred years, it must be "owned that the principle on which it depends has never been "either settled or stated in a satisfactory manner. In Courts of "Equity it has been a received opinion that it was founded on "some principle of the common law. In Courts of Law it is just "as much the practice to call it a principle of equity which the com-"mon law has adopted. This was strongly insisted upon by Mr. "Justice Buller in his celebrated judgment in the House of Lords "in the case of *Lickbarrow* v. *Mason* (*f*). It has also been said by "Lord Kenyon, that it was a principle of equity adopted by the "common law to answer the purposes of justice. The most emin-"ent equity lawyers that I have had an opportunity of conversing "with in times that are gone by, were unanimous in repudiating it [*316] "as the offspring of a Court of Equity. *The first case "that occurred on this subject affords some authority for the opinion "of Mr. Justice Buller and Lord Kenyon. It is the case of *Wise-"man* v. *Vandeput* (*g*), in 1690. That was a bill filed by the as-"signees of the bankrupt against the vendor. The Lord Chancel-"lor directed an action of trover to be brought by the plaintiffs, "upon which they recovered a verdict. It is clear, therefore, that "the rule had not at that time been adopted at law. The Lord "Chancellor, however, adopted it in equity, and notwithstanding "the verdict at law for the plaintiffs, made a decree against them. "The next case is that of *Snee* v. *Prescott* (*h*). Lord Hardwicke "again applied the rule to a certain extent in equity. But it is "remarkable that he received evidence of what was the custom of "merchants on this point, and he expressly founds his decree upon "the evidence of the custom of merchants as well as upon the "justice of the case. This decision occurred about the year 1742

(*e*) *Gibson* v. *Carruthers*, 8 M. & W. 321; 11 L. J. Ex. 145.
(*f*) *Lickbarrow* v. *Mason*, 4 Bro. P. C. 57; 6 East, 27.
(*g*) *Wiseman* v. *Vandeput*, 2 Vernon, 203.
(*h*) *Snee* v. *Prescott*, 1 Atk. 24.

"or 1743. The next case is that of *Ex parte Wilkinson* in 1755, "referred to in *D'Aquila* v. *Lambert* (*i*), which took place in 1761. "There the Lord Chancellor again grounded his decree on the "usage of merchants, and stated that the several previous decisions "which had taken place to the same effect had given great satisfac- "tion to the merchants. Numerous cases have followed at law, "showing that the right of stoppage in transitu under certain cir- "cumstances is now part of the common law. Nevertheless, owing "perhaps to the doubtful state of its parentage, many unsatisfactory "and inconsistent attempts have been made to reduce it to some "analogy with the principles which govern the law of contract, as "it prevails in this country between vendor and vendee. It is to "be observed, however, that the right of stoppage in transitu is not "peculiar to the law of England. It existed, I believe, in the com- "mercial states of Europe. The cases I have already referred to "show that it was practised in the Italian *states. That it [*317] "existed in Holland was proved in a case tried by Lord Lough- "borough, and mentioned by him in his judgment in the case of "*Lickbarrow* v. *Mason* (*k*). That it was the law of Russia was "also proved in the cases of *Inglis* v. *Usherwood* (*l*), and *Bohtlingk* "v. *Inglis* (*m*). It appears also on reference to the *Chapitre de la* "*Failleté* in the *Code Napoleon*, that the law of France on this "subject is in all points similar to our own. It is known that this "celebrated code is chiefly a digest of the law of France as it ex- "isted before the Revolution: indeed, the right of stopping in "transitu had before the composition, or digest of that code, ac- "quired the name in the French law of '*Revendication*.' It may, "therefore, be presumed to be a part of the law of merchants, which "prevails generally on the continent: the proof of which from time "to time, combined with its manifest justice and utility, has at "length introduced it into the common law of England, of which "the law merchant properly understood has always been reckoned "to form a part."

In this neat historical sketch Lord Abinger is not quite correct in saying that the right of stoppage in transitu exists in the old continental law. The statement of Lord Tenterden is accurate; the right abroad was different from, and in some respects more extensive, than that given by the law of England. This, however, does not in the least shake Lord Abinger's position, that the right was imported into the English law from the general law merchant, though probably much earlier than the case of *Wiseman* v. *Vandeput* (*n*). There is no part of the history of English law more obscure than that connected with the common maxim that the law

(*i*) *D'Aquila* v. *Lambert*, Ambler, 399.
(*k*) *Lickbarrow* v. *Mason*, 1 H. Bl. 364.
(*l*) *Inglis* v. *Usherwood*, 1 East, 515.
(*m*) *Bohtlingk* v. *Inglis*, 3 East, 381.
(*n*) *Wiseman* v *Vandeput*, 2 Vernon, 203, A. D. 1690.

merchant is part of the law of the land. In the earlier times it was not a part of the common law as it is now, but a concurrent [*318] and co-existent law enforced by the power of the realm, *but administered by its own courts in the staple, or else in the Star chamber. The Chancellor, in the 13 Ed. IV. 9, declares his view of the law thus: "This suit is brought by an alien merchant who "is come by safe conduct here, and he is not bound to sue by the "law of the land, to abide the trial of twelve men, and other forms "of the law of the land; but he ought to sue here (in the Star "chamber), and it shall be determined by the law of nature in "Chancery, and he may sue from hour to hour for the despatch of "merchants; and he said further, that a merchant is not bound by "statutes where the statutes are *introductiva novæ legis;* but if they "are *declarativa antiqui juris* (that is to say, of nature, &c.). And "since they have come into the kingdom, the king has jurisdiction "over them to administer justice, but that shall be *secundum legem* "*naturæ*, which is called by some the law merchant, which is the law "universal of the world." And the justices being called on, certified that the goods of this plaintiff were not forfeited to the crown as a waif (though those of a subject would have been), because he was an alien merchant. It is obvious that at that time the law merchant was a thing distinct from the common law. This accounts for the very remarkable fact that there is no mention whatever of bills of exchange, or other mercantile customs, in our early books; not that they do not exist, but that they were tried in the staple, and therefore were not mentioned in the books of common law; just as the matters over which the Courts of Admiralty, or Ecclesiastical Courts, have exclusive jurisdiction, are at this day never treated as part of the common law. But as the Courts of the staple decayed away, and the foreign merchants ceased to live subject to a peculiar law, those parts of the law merchant which differed from the common law, either fell into disuse, or were adopted into the common law as the custom of merchants, and after a time began to appear in the books of common law. How this great change was brought about does not appear; but though bills of exchange were in common use among merchants in the 13th century, the first mention of one in an English report is in *Cro. Jac.*, in the beginning of the [*319] 17th century; and though the right *of *rei vindicatio* must have prevailed on the continent from the time of the revival of the civil law, the first mention of it in our books is as late as 1690. It seems quite impossible that such matters should not have been the subject of litigation in some shape or other in England for centuries before those times.

This is now merely a matter of curiosity, for whatever may have been the origin of the right of stoppage in transitu, it has now been so often the subject of judicial decisions, that it is no longer possible to speculate on what the doctrine of the law of England ought to have been; it is proper to inquire what it is according to the decided

cases. But about the end of the last century, whilst the reported cases on the subject were few, the question of its origin was of great practical importance. If it was to be considered according to the theory of Mr. Justice Buller, an equitable right adopted into the law, it would follow that it could prevail only against those who had an inferior equity. If it was a legal right depending on the strictness of law, the vendee could not confer a legal right greater than he had himself, and in no case would a third party be in a better position than the first vendee. If it was a right arising from the custom of merchants, the *lex mercatoria* as practiced in England, it might be material to inquire what the usage of merchants was, and whether the existence of the bills of lading or other mercantile documents made any difference. There was a considerable difference of opinion among the Judges as to the principles on which this important branch of the law was to be administered, till in the year 1786, there occurred the celebrated case of *Lickbarrow* v. *Mason* (*o*), in which the whole law was much discussed, and though no decision was actually come to in that case, the principles of the law were closely scrutinized. From that time we may date the numerous decisions which have formed the law of stoppage in transitu into a system of law that leaves a few points open to dispute, but may be considered on the whole as settled.

*The different cases seem to establish the following [*320] points :—

1st. The right of stoppage in transitu is peculiar to one who holds the character of a vendor: below.

2nd. It can be exercised only whilst the vendor is wholly or partially unpaid: page 326.

3rd. It must be exercised while the goods are in transitu, that is, after they have left the possession of the vendor, and before they have come to the actual or constructive possession of the purchaser, or those who stand in his place: page 333.

4th. It cannot be exercised unless the buyer has failed, or become insolvent: page 380.

5th. It is a right which must be exercised by claiming or taking the goods as a right paramount to that of the purchaser: page 382.

And lastly, it may be defeated before the goods have come to the end of the transitus, by the assignment of the bill of lading to one who *bonâ fide* gives value for a property in the goods, and in no other way: page 384.

The most useful form of proceeding seems to be to collect the different authorities for each of those propositions separately.

The right of stoppage in transitu is peculiar to one who stands in the situation of a vendor.

[In *Kinloch* v. *Craig* (*p*), in 1790, a cargo of spirits was consigned

(*o*) *Lickbarrow* v. *Mason*, 6 East, 21.
(*p*) *Kinloch* v. *Craig*, 3 T. R. 783.

by a merchant in Edinburgh to his factors in London and stopped, on their insolvency, before it had come into their possession. Lord Chief Baron Eyre said, "The transaction between them was as "between principal and factor, and not as between vendor and ven-"dee * * * the right of stopping in transitu was out of the ques-"tion, that never occurring but as between vendor and vendee."]

In *Sweet* v. *Pym* (*q*), in 1800, the defendant, Pym, was a [*321] *fuller, and as such had a general lien on the clothes of his customers. He shipped some clothes on which he had his lien, on board a vessel, by the directions of his customer, who was indebted to him, and whose clothes he might, therefore, have retained if he pleased. The customer became insolvent, and Pym succeeded in getting possession of the goods, before the transitus was ended; but Lord Eldon at Nisi Prius, and afterwards the King's Bench, decided that, the delivery on board ship put an end to Pym's possession, and, consequently, to his lien, and that it could not be revived by stopping the goods in transitu.

This case must be distinguished from those in which the bailee who has a lien, makes a bargain with the carrier, by which the carrier is to forward the goods subject to the control of the bailee. There the bailee never parts with the possession at all, for his bargain with the carrier makes the possession of the carrier that of the bailee, and he in consequence keeps his lien till the goods are delivered to the consignee. But in such cases it is quite immaterial whether the consignee is solvent or not, for the bailee does not seek, by stopping the goods in transitu, to revive a lien which was lost, but to keep a lien which was never lost, because there was never a commencement of the transitus.

Thus in *Freeman* v. *Birch*, (*r*), in 1833, the King's Bench decided that a laundress who was in the habit of sending the washed linen to the owner in London, and herself paying the carriage, might maintain an action against the carrier for the loss of the linen. The Court said, that "she had a special property which had not "passed from her. The owner of the linen was not the employer "of the carrier, and the risk of the bailee was not over till the goods "were delivered."

The point that one who stands in the situation of a vendor has the right of stoppage, and that no one else has such a right, was decided in two cases arising out of the same bankruptcy. In the [*322] first, *Feise* v. *Wray* (*s*), in 1802, the facts *were, that Browne, who had since become a bankrupt, gave an order to Fritzing, a factor of Hamburgh, to procure and ship for him a quantity of wax. Fritzing purchased the wax in his own name, and on his own credit, from persons strangers to Browne; he shipped it in Browne's name, and on his account and risk, and drew bills on him

(*q*) *Sweet* v. *Pym*, 1 East, 4.
(*r*) *Freeman* v. *Birch*, 3 Q. B. 492, n.
(*s*) *Feise* v. *Wray*, 3 East, 93.

for the price of the wax and his commissions on the purchase. The defendant, who was the agent of Fritzing, stopped the goods in transitu on Fritzing's behalf, and the plaintiff, who was Browne's assignee, brought trover against him, contending, amongst other points, that Fritzing was but an agent of Browne with a lien, and could not stop the goods; the King's Bench said, the point was worth consideration if it had arisen, but it did not arise. Grove, J., said, "Fritzing may be considered in reailty the vendor, for the "name of the original owners was never made known to the bank-"rupt; there was no privity between them, but the goods were pur-"chased and the bills drawn in Fritzing's own name, and, there-"fore, he stands in the situation of vendor as to Browne."

In the second case, *Siffken* v. *Wray*, (*t*), in 1805, the same parties had a law-suit about another transaction. In this case, it appeared that Browne had ordered some corn of Dubois and Co., and desired them to draw for the price partly on his correspondent Fritzing. Dubois and Co. shipped the corn, and drew on Fritzing, who accepted the drafts. Browne became a bankrupt much indebted to Dubois and Fritzing, and not having paid the price of the corn. The defendant, who was Fritzing's agent, took possession of the corn by authority of the bankrupt, but without any authority from Dubois and Co., in trust to sell and apply the proceeds to meet the bills drawn against the corn. The plaintiffs were the assignees of Browne. Lord Ellenborough said, "The defendant had no right "from Fritzing, for Fritzing himself had no right to stop the goods "in transitu. Fritzing's situation in this transaction was very dif-"ferent from what it was in *Feise* v. *Wray* (*u*); there he was liable "in *the first instance for the price of the goods, and, there- [*323] "fore, the Court considered him as a vendor *quoad* the bankrupt "here to whom he had shipped them."

[In *Newson* v. *Thornton* (*x*), in 1805, where pork had been consigned on the joint account of the consignors and consignees, and a bill drawn on the consignees for half the price, it was held that the consignors might stop the goods in transitu on the insolvency of the consignee.

In *Morrison* v. *Gray*, (*y*), in 1824, a merchant in Dundee having shipped goods to a consignee in London, on hearing of the consignee's insolvency, indorsed and forwarded the bill of lading to the plaintiff, his agent in London, for the sole purpose of enabling him to stop the goods in transitu. It was held that the plaintiff, although not an indorsee for value, had a special property in the goods sufficient to enable him to maintain trover. In *Wood* v. *Jones* (*z*), in 1825, it was held that an agent who had no specific author-

(*t*) *Siffken* v. *Wray*, 6 East, 371.
(*u*) *Feise* v. *Wray*, 3 East, 93.
(*x*) *Newson* v. *Thornton*, 6 East, 17.
(*y*) *Morrison* v. *Gray*, 2 Bing. 260.
(*z*) *Wood* v *Jones*, 7 Dow. & Ry. 126.

ity to do so, might stop the goods on behalf of his principal, the vendor.].

In *Tucker* v. *Humfrey* (*a*), in 1828, where the consignor was nearly in the situation of Fritzing, in the case of *Feise* v. *Wray* (*b*), but was resident in this country, the whole transaction being English, the Common Pleas assumed his right to stop the goods in the character of vendor as indisputable.

It seems that in cases where a factor acting for a foreign correspondent purchases goods in his own name, and on his own credit, it is rather too qualified a phrase to say merely that he stands in the situation of vendor *quoad* the consignee. If he is not vendor, it is difficult to say who is, as there would be much difficulty in establishing any privity of contract between the foreign correspondent, and the original vendors. But there is a very gradual pro- [*324] gression from this *case through those in which the original vendor has a right to elect between the liability of the factor, and the consignee as principals, up to those cases in which the factor, if liable at all, is liable merely as a surety; and there may, consequently, be some difficulty at times in determining whether an agent can be said "to stand in the situation of vendor," so as to give him a right to stop the goods in transitu, on his own account or not.

[Although the right of stoppage in transitu must be exercised by one who stands in the position of a vendor, yet it is not necessary that the property should have vested in him. His interest will be sufficient if he has contracted to have them delivered to him. Thus in *Jenkyns* v. *Usborne* (*c*), in 1844, Hunter and Coventry of London had given an order for beans to Lloyd of Leghorn. The quantity shipped was in excess of that ordered, and Hunter and Coventry declined to accept it, but accepted a bill for the amount ordered, and the plaintiff, who was Lloyd's London agent, agreed to take the excess, and received from Hunter and Coventry a delivery order, and accepted a bill for the price. After this, but before the arrival of the beans in London, he sold the excess to Thomas, and sent him the delivery order. Thomas then pledged the delivery order with the defendant. Thomas stopped payment without having paid the plaintiff, and the plaintiff thereupon gave instructions to the captain to withhold delivery. The defendant obtained possession. Tindal, C. J., delivering the judgment of the Court sustaining the verdict for the plaintiff, said, "It was objected that it is only the "owner of the goods who can exercise that right (stoppage in "transitu); and that, in this case, the property in the goods had "not vested in the plaintiff at the time of the stoppage, but only "an interest in, and right to receive, a certain portion of the cargo, "to be afterwards ascertained and appropriated to the parties in-

(*a*) *Tucker* v. *Humfrey*, 4 Bing. 516.
(*b*) *Feise* v. *Wray*, 3 East, 93.
(*c*) *Jenkyns* v. *Usborne*, 7 M. & G, 678; 13 L. J. C. P. 196.

"tended: but we see no sound distinction, with reference to the "right of stoppage *in transitu, between the sale of goods, [*325] "the property of which is in the vendor, and the sale of interest "which he has in a contract for the delivery of goods to him."

And although an agent may stop goods in transitu on behalf of his principal, yet if he be not the agent at the time of the stoppage it will be ineffectual. In *Bird* v. *Brown* (*d*), in 1850, the defendants, who were purchasers of certain bills of exchange which had been drawn on consignees in Liverpool in respect to certain shipments, acting in the vendor's interest, but without his authority, stopped the goods on hearing of the consignee's insolvency, and obtained possession. The plaintiffs, who were the assignees of the consignees, demanded the goods, and subsequently an agent, duly appointed by the vendor, ratified the act of the defandants. But it was held that the transitus was at an end when the goods had reached the port of destination, and when the consignees, having demanded the goods and tendered the amount of the freight, would have taken them into their possession, but for the wrongful delivery of them to other parties.

In *Hutchings* v. *Nunes* (*e*), in the Privy Council in 1863, a case somewhat similar to the last, the goods were stopped in transitu by a person who had previously done business with the consignors, and who considered himself and was considered by them to be their agent, but he had no express authority at the time of the stoppage to stop the goods. The stoppage was held good by Lord Kingsdown and L.JJ. Knight-Bruce and Turner.

It has not yet been decided whether a surety for an insolvent buyer has a right to stop in transitu, but Mr. Benjamin in his work on Sales (*f*), says, "That if a surety for an insolvent buyer should "pay the vendor, it would seem that he would now have the right "of stoppage in transitu, if not in *his own name, at all [*326] "events in the name of the vendor, by virtue of the provisions of "the fifth section of the Mercantile Law Amendment Act (19 & 20 "Vict. c. 97)." No case has yet been decided on this section, which in effect says that every person who, being surety for the debt of another, shall pay such debt, shall be entitled to stand in the place of the creditor, and to use all the remedies, and if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt.]

(*d*) *Bird* v. *Brown*, 4 Ex. 786; 19 L. J. Ex. 154.
(*e*) *Hutchings* v. *Nunes*, 1 Moo. P. C. C. N. S. 243.
(*f*) Benjamin on Sales, Book V., Part I., s. 1, 2nd ed., p. 691.

The right of stoppage in transitu can be exercised only whilst the vendor is wholly or partially unpaid.

There never could be any question made, that if the vendor was ever to have right of stoppage in transitu at all, he must have it when he was wholly unpaid; but it was at one time a question whether he could have any such right when partially paid.

In *Hodgson* v. *Loy* (g), in 1797, the bankrupt had purchased of Cooper 104½ firkins of butter, at 41s. a firkin. He paid him 30*l.* on account, consented to consider an old account of 20*l.* due to him from Cooper as paid, and gave Cooper a bill for 100*l.*, in all paying him 150*l.* on account. Then after his bankruptcy the defendant by Cooper's desire stopped the goods in the hands of a carrier. Some months afterwards, Cooper tendered the assignees of the bankrupt the bill, which in the mean time was dishonoured, and the 30*l.* The action was trover by the assignees. They contended that [*327] stoppage in transitu was a rescission of the *contract, and therefore could not be exercised when there had been a part payment, at least without an offer to return the price actually paid; and that in this case the tender came too late, and did not include the debt for 20*l.* for which Cooper had given credit.

The Judges at first doubted, and had ordered a second argument on this point, but before the argument they said it was unnecessary. "They were clearly of opinion that the circumstance of the vendee "having partially paid for the goods, does not defeat the vendor's "right to stop them in transitu, the vendee becoming bankrupt."

Neither does it make any difference, though the goods were sold on credit which had not expired at the time of the stoppage, so that the price was not then due. In two cases which were very much litigated, *Inglis* v. *Usherwood* (h), in 1801, and *Bohtlingk* v. *Inglis* (i), in 1803, the litigation arose out of a transaction in which a cargo of goods were shipped on board a vessel chartered by the bankrupt, and according to the terms of the contract "the goods were to be drawn for a month after shipment." A stoppage in transitu made before the lapse of the month was held good; and it seems to have been not thought worth while even to raise the point that the time had not come when the vendors were entitled to demand payment, if the purchaser had remained solvent.

But when the vendor has received bills of exchange or other securities for the whole price, the case may seem not so clear. He is not quite a paid vendor, for the bills may prove worthless; he is not quite an unpaid vendor, for the bills may prove good. It seems, however, very well settled, that where the vendor is no otherwise paid than by having received the insolvent puschaser's acceptances, he may stop the goods; though he may have negotiated the bills,

(g) *Hodgson* v. *Loy*, 7 T. R. 440.
(h) *Inglis* v. *Usherwood*, 1 East. 515.
(i) *Bohtlingk* v. *Inglis*, 3 East 381.

and they are still outstanding and not yet at maturity. And this is very reasonable, for it is quite certain that the insolvent will *dishonour his acceptances, and all but certain that the [*328] holders will fall back on the drawer for payment.

[The effect of taking a bill or note from the debtor depends on the intention of the parties. Primâ facie, it merely amounts to an agreement to give the debtor credit for the time it has to run, and the effect is to suspend both the vendor's lien and his right to sue for the price of the goods until the bill has arrived at maturity and been dishonoured, or the vendee has become insolvent; but it may have been the intention of the parties that the giving of the bill should be an absolute payment, in which case the vendor runs the risk of its being paid, and he is in the same position as if he had been paid in cash. The vendee can no longer be sued for the price of the goods, although he remains liable on the bill (*k*).]

In the case of *Feise* v. *Wray* (*l*), in 1802, already cited, Fritzing the vendor, had drawn bills on Browne, the purchaser, for the full price. Browne accepted the bills, and Fritzing negotiated them. Browne failed, and the goods were stopped on the 11th of September. The bills did not arrive at maturity until the 7th of October, they were then dishonoured; but Fritzing himself had by that time became insolvent, and the bills were not taken up; yet the stoppage was held good, the King's Bench saying that the right of the holder of the bills to prove against the estate of Browne could not have more effect than part payment.

In *Patten* v. *Thompson* (*m*), in 1816, the plaintiffs had drawn on the purchaser for the price, and held his acceptances *which [*329] were not due at the time they stopped the goods, yet the stoppage was held good.

[In the case of *Wood* v. *Jones* (*n*), in 1825, Brightman, of Newcastle, had consigned to the plaintiffs, Quebec merchants, goods to be sold for his account. The plaintiffs then shipped to Brightman three cargoes of timber, but not specifically in return for Brightman's consignment. The plaintiffs drew on Brightman to cover the third cargo. Two of the cargoes arrived: Brightman dishonoured

(*k*) *Owenson* v. *Morse*, 7 T. R. 66.

On the question of what amounts to payment, see *Bolton* v. *Richard*, in 1795, 6 T. R. 139; *Read* v. *Hutchinson*, in 1813, 3 Camp. 352; *Swinyard* v. *Bowes*, in 1816, 5 M. & S. 62; *Van Wart* v. *Woolley*, in 1824, 3 B. & C. 439; *Hawse* v. *Crowe*, in 1826, 1 Ry. & M. 414; *Robinson* v. *Read*, in 1829, 9 B. & C. 449; *Robson* v. *Oliver*, in 1847, 10 Q. B. 704; 16 L. J. Q. B. 437. And where the vendor elects to take some form of payment other than cash, *Everett* v. *Collins*, in 1810, 2 Camp. 515; *Brown* v. *Kewley*, in 1801, 2 B. & P. 518; *Smith* v. *Ferrand*, in 1827, 7 B. & C. 19; *Marsh* v. *Pedder*, in 1815, 4 Camp. 257; *Camidge* v. *Allenby*, in 1827, 6 B. & C. 381; *Alderson* v. *Langdale*, in 1832, 3 B. & Ad. 660; *Atkinson* v. *Hawdon*, in 1835, 2 Ad. & El. 628; *Sibree and Tripp*, 15 M. & W. 23; *Goddard* v. *O'Brien*, 9 Q. B. D. 37.

(*l*) *Feise* v. *Wray*, 3 East. 93.

(*m*) *Patten* v. *Thompson*, 5 M. & S. 350.

(*n*) *Wood* v. *Jones*, 7 Dow. & Ry. 126.

the bill, and the plaintiff's agent believing that Brightman's consignment would not cover the value of the timber stopped the third cargo on board the defendant's ship. It was argued for the defendant that a stoppage in transitu cannot be made on a mere apprehension that the goods in the hands of the consignor might not ultimately be sufficient to cover the consignment, and that to justify a stoppage in transitu, the agent must be in a position to show that upon a balance of the accounts at the time the stoppage is made his principals had a specific liquidated demand against the consignee. The Court held the stoppage to be good, Abbott, C. J., saying, "that if the cargo in question had been intended as a re-"turn for the goods consigned by Brightman there would have been "a great deal of weight in the argument."]

In *Edwards* v. *Brewer* (*o*), in 1837, the Exchequer would not listen to an attempt to argue that the vendor who held the purchaser's acceptance not yet at maturity, could not stop the goods without tendering the acceptance.

Against these cases is to be set the Nisi Prius decision of Lord Ellenborough in *Davis* v. *Reynolds* (*p*), in 1815, which certainly seems inconsistent with them. There Peacock and Company, the vendors, held the purchaser's acceptance for the goods: the purchaser sold the goods to Davis, the plaintiff, whilst yet at sea, and indorsed to him the bill of lading; but it was not stamped, and [*330] therefore could not be proved: then *Peacock and Company stopped the goods, and got them from the defendant, a wharfinger, under an indemnity. The plaintiffs recovered in trover, and Lord Ellenborough is reported to have said, that "till the time of credit has ex-"pired, and the bill was either paid or dishonored, Peacock was in the "situation of a paid vendor." The only possible distinction between this case and those previously cited, is that there had been an assignment for value in this case, but unaccompanied by taking possession or by proof of the indorsement of the bill of lading. In *Dixon* v. *Yates* (*q*), a countermand of authority to receive the goods under circumstances precisely similar, but made after the bill accepted by the intermediate purchaser was at maturity and dishonoured, was held good. That case is an authority, that the taking of the insolvent's acceptances by the vendor, has no effect on the vendor's right as against a sub-purchaser, (who has not taken an indorsement of a bill of lading), after the acceptances are dis honoured. And *Feise* v. *Wray* (*r*) is an authority that the taking of the purchaser's acceptances does not suspend the vendor's right to stop the goods, as against the original purchaser. *Davis* v. *Reynolds* (*s*) is a decision that it does suspend them as against a sub-

(*o*) *Edwards* v. *Brewer*, 2 M. & W. 275.
(*p*) *Davis* v. *Reynolds*, 4 Camp. 267.
(*q*) *Dixon* v. *Yates*, 5 B. &. Ad. 313, *post*, p. 342.
(*r*) *Feise* v. *Wray*, 3 East, 93, *ante*, p.321.
(*s*) *Davis* v. *Reynolds*, 1 Stark. 115.

purchaser. The reason of this distinction is not obvious: the probability, is, that Lord Ellenborough, though as a Judge he could not read the bill of lading for want of a stamp, was not able to prevent his judgment being warped by the natural feelings of repugnance to the effect on evidence of the stamp laws, (certainly, for long the most clumsy and unjust provisions in English law;) and that he was astute to defeat the stamp laws, an error not without precedent amongst Judges. The case, however, has never been expressly overruled.

When the vendor has received payment from the holder of the bill, and is not liable to take it up; he is paid in every sense of the word. Thus in *Bunney* v. *Poyntz* (*t*), in 1834, *where the [*331] agent of the vendor took in payment a promissory note, payable to his (the agent's) own order, negotiated it and embezzled the money, and the note was afterwards dishonoured, the King's Bench held that the vendor was paid. His agent had received the money, and the fact that he had misapplied it was wholly immaterial as between the parties to the action, and as the vendor could not be made to refund, he must be considered as paid. The fact that he had really received no benefit from the note, gave his claim a colour of justice, but on examination it was quite immaterial.

In *Vertue* v. *Jewell* (*u*), in 1810, there was a running account between two parties, in which were included bills of exchange not yet at maturity; and the party who on the balance of the account was the debtor, consigned goods on account of and to meet this balance. Before the goods arrived the consignee became bankrupt, and if the bills for which he had credit were struck out of the account, the balance would be the other way. The consignor stopped the goods, and the action was trover by the plaintiff, who represented the consignee, against the defendant, who represented the consignor. Lord Ellenborough ruled, that "the consignor being at "the time of the consignment indebted on the balance of accounts, "divested him of all control over the barley from the moment of "shipment. The non-payment of the bills of exchange cannot be "considered." And this ruling was approved of by the King's Bench.

Perhaps, however, this was rather a case of pledge than sale, as it seems difficult to suppose that the parties did not from the first intend the surplus, if any, to be accounted for. If so, the consignees had clearly a special property in the consignment, and the insolvency and probable dishonour of the bills could not divest that special property, though it probably would very materally affect its ultimate value. In *Patten* v. *Thompson* (*x*), Lord Ellenborough in

(*t*) *Bunney* v. *Poyntz*, 4 B. & Ad. 568.
(*u*) *Vertue* v. *Jewell*, 4 Camp. 31.
(*x*) *Patten* v. *Thompson*, 5 M. & S. 350.

delivering judgment said, "I have looked into the case of *Vertue* [332] " v. **Jewell* (*y*), and find that there the bill of lading was " was indorsed and sent by the consignor, on account of a balance " due from him, including several acceptances then running, so " that it was in the nature of a pledge to cover those acceptances." The case, therefore, is perhaps rather an authority for the first proposition, " that the right of stoppage in transitu is peculiar to a vendor." [Mr. Benjamin says of this case, in his work on Sales (*z*), that if it is correctly reported, it is very questionable law.]

There is no reported case in which the vendor had taken, on account of the consignment, the acceptance of a third person (*a*); but it would seem on principle in such cases, that until the bill is dishonoured he must be considered as paid, as the insolvency of the purchaser does not involve in it any necessity of the badness of the bill; but when the bill is dishonoured, then as the vendor might sue the purchaser for the price if he remained solvent, it would seem that he must be considered as an unpaid vendor for all purposes.

[In *Valpy* v. *Oakeley* (*b*), in 1851, the defendant contracted to deliver 500 tons of iron at £4 a ton to Boydell and Roper He delivered 315, or 185 short. Boydell and Roper, before their bankruptcy, accepted three bills for the price of the 500 tons. One was paid at maturity, and at the time of the bankruptcy the defendant held another, and a banking firm the third, for value. The plaintiffs, who were the assignees of Boydell and Roper, brought this action to recover the full value of the iron not delivered. It was held they could not do so. Lord Campbell, C.J., said, the case rested upon the principle of stoppage in transitu, a right which may be exercised where bills have been given and are dishonoured.

In *Griffiths* v. *Perry* (*c*), in 1859, a case similar to the last [*333] *one, the defendant had agreed to deliver to the plaintiff 400 parcels of iron, and took the plaintiff's acceptance for the price. The defendant indorsed the bill to his bankers, who credited him with the amount. He delivered 100 parcels and then became bankrupt. Subsequently the plaintiff became bankrupt and his acceptance was dishonoured. The bankers claimed to be creditors of the plaintiff in respect of the acceptance. The plaintiff brought this suit for the price of the 300 parcels, but it was held that he could only recover nominal damages]

(*y*) *Vertue* v. *Jewell*, 4 Camp. 31.

(*z*) Benjamin on Sales, 2nd ed., 1873, p. 694.

(*a*) But see *Read* v. *Hutchinson*, in 1813, 3 Camp. 352; *Swingyard* v. *Bowes*, in 1816, 5 M. & S. 62; *Robinson* v. *Read*, in 1829, 9 B. & C. 449; *Robson* v. *Oliver*, in 1847, 10 Q. B. 704; 16 L. J. Q. B. 437; *Belshaw* v. *Bush*, in 1851, 11 C. B. 191; 22 L. J. C. P. 24.

(*b*) *Valpy* v. *Oakeley*, 16 Q. B. 941; 20 L. J. Q. B. 380.

(*c*) *Griffiths* v. *Perry*, 1 E & E. 680; 28 L. J. Q. B. 204. See also *Ex parte Chalmers*, 8 Ch. Ap. 289; 42 L. J. Ch. 37, *post*, p. 474, and cases following.

The right of stoppage in transitu must be exercised while the goods are in transitu, that is, after they have left the actual or constructive possession of the vendor, and before they have come to the actual or constructive possession of the purchaser, or those who stand in his place.

Before the vendor has parted with the actual or constructive possession of the goods, the transitus has not commenced, and no stoppage is required to give the unpaid vendor his rights: he retains them in respect of the possession with which he has not parted. And after the purchaser, or those who stand in his place have acquired the possession of the goods, the stoppage comes too late to give the vendor any of his rights, for the possession has rendered the purchaser's rights of property and possession indefeasible and absolute. It is only whilst the goods are in an intermediate state—out of the possession of the vendor, and not yet in that of the purchaser, that the right can be exercised.

And here it may be as well to state a little more accurately what is meant by the word "possession" in this place, for it is used in a narrower and more restricted sense than in the general technical legal import of the word, and yet in a more extended sense than its popular meaning. For in general, in technical language, one is said to be possessed of goods when he has the property, and an immediate right to have the goods dealt with as he will; yet, a purchaser on credit of a *specific chattel, who has the pro- [334] perty, and whilst solvent, the right to deal with the goods as he will though they remain in the vendor's hands, and who, therefore, in general legal language, may be called possessed of them, has never had such possession as will determine the vendor's rights in case the purchaser becomes insolvent. And yet, circumstances far short of an actual delivery into the hands of the purchaser, amount to such a constructive possession as is sufficiant to render the purchaser's property indefeasible.

Before the bargain and sale is complete the property in the goods remains in the vendor, and the actual custody of the goods is either in the vendor himself, or in some one who holds them as his bailee; and though by the completion of the bargain and sale, the property in the goods is at once transferred to the purchaser, so as to give him the rights and liabilities attending the proprietor; and though the right of possession may also be transferred, so as to give the purchaser the rights and remedies belonging to the possessor of the goods, yet, the privity of contract with the vendor's bailee is not transferred with the property and right of possession. The person who has the actual custody of the goods may be liable as a *wrong-doer*, if he in any way interferes with the purchaser's right of possession, but he has no *contract* with the purchaser; he continues to hold the goods under his old contract with the vendor until something is done to alter the capacity in which he holds them. Till

then, they are in cases of this nature, said to remain in the possession of the vendor, and even if the purchaser before his insolvency had the immediate right of possession, the unpaid vendor's right remains unaltered.

But when either the actual custody of the goods has been shifted into the hands of one who from the first held them as the bailee of the purchaser, or the person holding them has changed the character in which he holds them so as to become the bailee of the purchaser, the goods are said to be in the possession of the purchaser. In the first case they are often said to be in his actual possession, in the second in his constructive possession. Neither phrase [*335] quite accurate, and *there is no legal distinction between the two, in both cases alike the vendor's rights are gone. And the same law is true, when the party who thus takes possession is one who has acquired the purchaser's rights, either by bargain or operation of law.

It is whilst the goods are are in an inter-mediate state, and in the custody of one who holds them, neither by virtue of a contract to keep them made with the vendor, nor by a similar contract with the purchaser, but as an agent undertaking to forward them from one to the other, that the goods are in transitu.

The important question therefore, in every case is, in what capacity are the goods held by him who has the actual custody? In many cases this is quite clear, but in others it is an exceedingly difficult question to answer, more especially where the goods remain in the same custody, and the question is, whether the character of the holder has been changed, and at what time it was changed. It becomes then a question depending upon what was done, and what was the intention with which it was done; and as the acts are often imperfectly proved, and in themselves equivocal, and the intention often not clearly known to the parties themselves, it is not surprising that there should be much litigation upon the point; the general principles, however, seem to be those above stated.

Before collecting the cases on the commencement and determination of the transitus (*d*), it will be as well to collect those cases which decide when the vendor's possession ends, and the buyer's possession begins when there is no transitus (*e*). The principles are precisely the same, indeed, so much so, that cases of this class are frequently, though inaccurately, called cases of stoppage in transitu.

Where the goods are in the hands of the vendor himself or his immediate servants, he holds them as vendor and retains his rights, unless it can be shown that he has agreed to hold them in a new character. Where this can be shown, he has lost his rights, though [*336] he may never have parted with *the actual possession. Where the purchaser has transferred his rights to a third party, it

(*d*) *Post*, p. 351.
(*e*) See also *ante*, p. 26.

it very likely that the original vendor should agree with him to continue to hold the goods as his warehouseman, without retaining any interest in the goods, which have by the subsale, become the property of one who is not the vendor's debtor; and this is particularly likely, when the credit given by the vendor to the first vendee, is longer than that given to the subpurchaser by the first vendee. Accordingly, when there is a subpurchaser, an agreement on the part of the vendor to consider himself the subpurchaser's bailee, may be proved by comparatively slight evidence.

In *Stoveld* v. *Hughes* (*f*), in 1811, the facts were, that Hughes had sold Dixon and Co. a lot of timber lying on his wharf. They marked the timber in his presence with their mark, and accepted a bill at three months for the price. Whilst the bill was still running, Dixon sold the timber to Stoveld, whose agent told Hughes of it. Hughes said "very well," showed the agent the timber, and assisted to change the marks on it. Stoveld paid Dixon; then Dixon failed before the bill became due, and Hughes claimed to retain the goods against Stoveld, until he was paid the price due from the first purchaser; but the King's Bench held, that he could not retain them. Lord Ellenborough said, "When the sale by Dixon to the "plaintiff was made known to the defendant Hughes, he assented "to it by saying, 'very well,' and to the marking of the timber by "the plaintiff's agent, which took place at the same time. If that "be not an executed delivery, I know not what is. * * * If, "indeed, the marking of the timber by the plaintiff's agent had not "been done with the knowledge and consent of the defendants, the "vendors, it may be admitted, for this purpose, that they would "not have been bound further than they were already, by what had "taken place as between them and the original vendees."

But between the original vendor and the first purchaser *an [*337] agreement to hold as the purchaser's bailee is not probable, for there seems little to induce the vendor to consent to abandon his lien; and the more recent decisions are, that between them, an agreement to altar the character of the vendor's possession must be clearly proved. In some of the older cases, language is reported that almost looks as if the Judges were stating as a proposition of law that an assent on the part of the vendor to any act of ownership whatsoever, either by the purchaser or his sub-purchaser, put an end to the vendor's rights, whilst in the more recent cases, there are some *dicta* looking as if it was thought that the same agreement, which if made with a sub-purchaser, would determine the vendor's rights by altering the character of his possession, would not have that effect if made with the original purchaser, but it seems, that the true distinction is merely as to the *quantum* of proof required. If the vendor consents to acts of partial ownership, on the part of the sub-purchaser, with whom he has no con-

(*f*) *Stoveld* v. *Hughes*, 14 East, 308.

tract, it affords a fair presumption of an agreement with him to hold the goods as a bailee. If he consents to similar acts by the purchaser with whom he already has a contract, the fair presumption is, that the acts are assented to in consequence of the original contract, which remain unchanged. But in either case the vendor's rights cease when he has agreed to change the character of his possesion, and not before.

[In *Owenson* v. *Morse* (*g*), in 1796, the plaintiff went into the defendant's shop and agreed to purchase some articles of silver plate, and paid for them in bank-notes. The defendant, in order to have the plaintiff's arms engraved on the goods, employed an engraver and paid him, instructing him to return the goods when done to him, the defendant. The bank failed before the notes were presented, and it was held that there had been no delivery to the plaintiff.

And in *Boulter* v. *Arnott* (*h*), in 1823, where the defendant purchased some cigars in the plaintiff's shop and had them [*338] *packed in his, the defendant's, own boxes; the transaction was for ready money, and the cigars not having been paid for, it was held that there had been no delivery.]

Several of the cases decided upon the Statute of Frauds, turn upon this distinction, and as they have already been cited in the earlier part of this work, it is unnecessary to cite them here, at length.

In *Hurry* v. *Mangles* (*i*), at Nisi Prius, in 1811, before Lord Ellenborough, the facts were, that the defendant Mangles had sold a quantity of oil to Smith, who accepted a bill at six months for the price. Mangles received warehouse rent from Smith. Before the bill arrived at maturity, Smith became bankrupt, and then the plaintiff Hurry, who in the interim had bought the oil from Smith, and paid him for it, applied for it and was refused. This seems to have been the first notice that Mangles had of the subsale, and as there could, therefore, be no attornment to Hurry, or estoppel, it seems that Hurry stood precisely in the position which Smith's assignees would have done, see *Dixon* v. *Yates* (*k*), and that the subsale was immaterial. The action was in trover. Lord Ellenborough said, "The acceptance of warehouse rent was a com-"plete transfer of the goods to the purchaser. If I pay for a part "of a warehouse, so much of it is mine. This is an executed de-"livery by the seller to the buyer. * * * It would be overturning "all principles, to allow a man to say, after accepting warehouse "rent, the goods are still in my possession, and I will detain them "till I am paid. The transitus was at an end. The goods were "transferred to the person who paid the rent, as much as if they

(*g*) *Owenson* v. *Morse*, 7 T. R. 64.
(*h*) *Boulter* v. *Arnot*, 1 Cr. & Mee. 333.
(*i*) *Hurry* v. *Mangles*, 1 Camp. 452.
(*k*) *Dixon* v. *Yates*, 5 B. & A. 346, *post*, p. 342.

"had been removed to his own warehouse, and then deposited under "lock and key."

In *Anderson* v. *Scott* (*l*), and *Hodgson* v. *Le Bret* (*m*), Lord Ellenborough acted on the same principle. In *Elmore* v. *Stone* [*339] (*n*) and *Carter* v. *Touissaint* (*o*), the Common Pleas and King's Bench came to opposite conclusions as to the inference to be drawn from nearly the same facts. In those cases the question was, whether there was an actual receipt under the Statute of Frauds.

In *Miles* v. *Gorton* (*p*), in 1834, Gorton had sold hops lying in Gorton's warehouse, to Faux, and rendered him an invoice stating the goods to be "at rent." Faux subsold part of the hops, which were delivered to the sub-purchasers, and then became bankrupt, not having paid any part of the price. His assignees brought trover against Gorton, for not giving up the portion of the goods which remained in his hands. They relied on *Hurry* v. *Mangles* (*q*), as showing there was an executed delivery. The Court of Exchequer decided in favour of the defendant. Bayley, B., said, "I am of "opinion that the charge of warehouse rent makes no difference, "and I should have thought so if the warehouse rent had been actually paid. In *Hurry* v. *Mangles* (*q*), the circumstances were "widely different; there the rights of a third party had intervened. "He had bought and paid for the goods, and *then paid* warehouse "rent to the vendors; under these circumstances, it was rightly "held, that there was a delivery *to the sub-vendee* on the part of the "vendors, who after *such receipt of rent from the sub-vendee*, must "clearly be considered as holding the goods as his agents. [Here, "in point of fact, the warehouse rent was not actually paid, but "only charged, and such charge amounted to a notification by the "seller to the purchaser that he was not to have the goods, not only "until the payment of the price, but of the rent. In this case, "therefore, the vendor had originally a right to hold both for the "price and the rent; and I think that the effect is not to make, as "has been argued, the warehouse of the vendor the warehouse of "the vendee, but to make it a part of the contract between the "parties that the goods are *not to be delivered until not [*340] "only the price but the rent is paid."]

It is to be observed, that Bayley, B., was under a mistake as to the facts in *Hurry* v. *Mangles* (*r*), (at least those parts of his judgment marked in italics, are contradicted by the report of that case in 1 Camp. 452) but the distinction between what he supposes to be *Hurry* v. *Mangles* (*r*), and *Miles* v. *Gorton* (*s*), is strong and

(*l*) *Anderson* v. *Scott*, 1 Camp. 235, n.
(*m*) *Hodgson* v. *Le Bret*, 1 Camp. 233.
(*n*) *Elmore* v. *Stone*, 1 Taunt. 458, *ante*, p. 28.
(*o*) *Carter* v. *Touissaint*, 5 B. & A. 855, *ante*, p. 30.
(*p*) *Miles* v *Gorton*, 2 C. & M. 504.
(*q*) *Hurry* v. *Mangles*, 1 Camp. 452.
(*r*) *Hurry* v. *Mangles*, 1 Camp. 452.
(*s*) *Miles* v. *Gorton*, 2 C. & M. 504.

clear, if the receipt of warehouse rent is material only as evidence of the vendor's assent to change the capacity in which he holds possession of the goods.

In *Townley* v. *Crump* (*t*), in 1835, Crump the vendor of wine, who was also a warehouseman, gave the purchaser Wright, a note in these terms:—"Mr. B. Wright. We hold to your order 39 pipes and 1 hhd. red wine, marked J. C., J. M., No. 41 a. 67.—69 a. 80 pipes, No. 105 hhd. sent free to 29th November next. J. Crump and Co."

The wine remained in Crump's warehouse. Wright accepted a bill for the price, and then became bankrupt. His assignees brought an action of trover against Crump, for the wine specified in the note. Lord Abinger, at Nisi Prius, seems to have thought the note was like a delivery order or a bill of lading, giving the vendee authority to get the possession, but not equivalent to giving it to him; he reserved the point, and directed a nonsuit, and the Queen's Bench refused to grant the plaintiffs a rule nisi.

The Court observed, that "no case had been cited where "the "question arose between the original vendor and vendee," so they seem to have acted on the same principle as in the case of *Miles* v. *Gorton* (*u*).

[In *Grice* v. *Richardson* (*x*), in the Privy Council in 1877, the appellants were both vendors and warehousemen. The respondents [*341] were the trustees of Webster and Co., the *insolvent purchasers. The appellants sold tea lying in their warehouse to Webster and Co., and gave them delivery warrants or certificates which stated that the tea was deliverable to Webster and Co. They delivered a portion of the tea, and charged warehouse rent for the whole of it, and they appear to have made a transfer of it into Webster and Co.'s name in the warehouse book. Webster and Co. became insolvent without having paid for the tea. The Court held that the appellants were entitled to retain the tea.

Although this case seems quite consistent with the authorities, Sir Barnes Peacock, in delivering the judgment of the Court, seems to have had present in his mind a distinction as a matter of law, between actual and constructive possession, which it is submitted does not exist.]

Very commonly goods which are the subject of commerce, are not in the custody of the owner, but of a third party, as a wharfinger, warehouseman, or the like. When such is the case, if the property be transferred by a bargain and sale, the vendor still retains his rights, until the warehouseman holds the goods for the purchaser: and during the interval between the time at which the purchaser has acquired authority to call upon the warehouseman to hold the goods for him, and the time when the warehouseman does so hold,

(*t*) *Townley* v. *Crump*, 1 A. & E. 58.
(*u*) *Miles* v. *Gorton*, 2 C. & M. 504, *ante*, p. 339.
(*x*) *Grice* v. *Richardson*, 3 Ap. Ca. 319; 47 L. J. P. C. 48.

the vendor's rights are analogous to those which he has whilst the goods are in transitu, and it is common to call the goods in transitu in such cases. But it is not accurate, the goods are all the time in the possession of the vendor, and the question is, whether he had a right to countermand an authority to change that possession, and whether he has exercised such a right whilst he had it.

As a general rule of English law, an authority, at any time before execution, may be revoked by him who gave it; but where the authority is bought for a consideration and coupled with an interest (*y*), it is both transferable and irrevocable. If, therefore, the purchaser be in a posision to call upon the vendor to deliver him goods, and the vendor *instead thereof gives him an author- [*342] ity to obtain possession of goods in the custody of a third party, that authority may be transferred by the purchaser; and so long as there continues to be a consideration to the vendor for granting the authority, it cannot be revoked by the vendor. But if such a change of circumstances takes place that the vendor would no longer be bound to deliver possession of the goods, then the consideration for giving the authority has failed, and the vendor may, if the authority has not been executed, revoke it just as he might then refuse to give it.

It does not seem material whether the authority to take possession be merely implied from the contract of sale vesting the right of possession in the purchaser, or be given expressly, and it probably does not affect this right whether the authority be in writing or not, though by recent statutes the effect of a written delivery order is considerably enlarged; and it is not material that the authority has been transferred to a third party, who has *bonâ fide* paid the intermediate vendee, if the first vendor has done nothing to induce him so to do. The only questions are, whether, at the time the first vendor revoked the authority, he was in such a position that he might refuse to deliver, and whether, before the revocation, the authority had been executed; for if any part of the goods have been put in the actual or constructive possession of the purchaser or his assigns, the vendor's right as to that part is gone.

These points seem all to be deducible from *Dixon* v. *Yates* (*z*), in 1833, in which the whole law was a good deal discussed. There, Dixon and Co. were owners of a quantity of rum lying in Yates' warehouse. On the 13th August they sold 46 puncheons, specified by marks and numbers, to Collard; Collard on the same day accepted two bills payable at 3 and 4 months for the price. Shortly after the sale, Dixon and Co. gave Collard a delivery order for 2 puncheons, which were accordingly taken away by him; they refused to give him a delivery order for the remaining *44, [*343] which were the subject of this action. On the 28th October Collard sold 26 puncheons of the 44 remaining in Yates' warehouse, to Kaye, who paid him for them, but took no possession. On the

(*y*) *Croyton* v. *Lithebye*, 2 Will. Saund. 365.
(*z*) *Dixon* v. *Yates*, 5 B. & Ad. 313.

7th September (*a*), Collard sold the remaining 18 puncheons to Bond, and Proctor, who paid for them. Yates, the warehouseman, without any further authority from Dixon and Co., allowed Bond and Proctor to take three of the 18 puncheons away; the other 15 remained as before. On the 16th November Collard was insolvent, and his bill dishonoured, and on the 18th November Dixon and Co. ordered Yates not to deliver any of the 44 puncheons of the rum, but this order came after Bond and Proctor had, as has been already said, taken away three puncheons. [On the 19th November Dixon and Co. demanded the rum from Yates, who refused to deliver it: and on the same day Kaye, Bond, and Proctor presented to Dixon and Co., for their acceptance, delivery orders for the 26 and 15 puncheons respectively, which Dixon and Co. refused to accept.] The whole question came before the Court of King's Bench on an interpleader between the four parties; Dixon and Co. the original vendors, Yates the warehouseman, and Kaye, and Bond and Proctor, the sub-purchasers. The Court of King's Bench, after a long and learned argument, ordered the 41 puncheons then remaining in Yates' warehouse to be given to Dixon and Co., and the costs of the litigation concerning them to be paid by Kaye, and Bond and Proctor, and discharged Yates, and Bond and Proctor from the claim of Dixon and Co. for the value of the three puncheons delivered to Bond and Proctor, and ordered Dixon and Co. to pay the costs of the litigation concerning them. This was, therefore, a direct decision that the three puncheons were rightfully delivered to Bond and Proctor, though no express authority to deliver possession was given by Dixon and Co. (but rather an attempt to refuse even that authority implied by the sale on credit), and that the countermand as to these three puncheons was too late; but that it was a proper [*344] *countermand as regarded the other 41 puncheons, notwithstanding that the sub-purchasers had *bonâ fide* paid their vendor, the first purchaser, Collard.

The practical dispute in such cases most commonly is, as to whether the authority to take possession was at the time of the countermand already executed or not; for if, before notice of countermand is given to the bailee, the authority is so far acted upon as to put the purchaser in actual or constructive possession of the goods, it is no longer in the vendor's power to countermand the authority. In the case of *Dixon* v. *Yates* (*b*), the sub-purchasers had marked, coopered, and guaged the puncheons of rum, and had, as before said, taken complete possession of a part. It was urged that these acts amounted to a taking constructive possession of the whole, but the Court of King's Bench decided that those acts were in themselves equivocal, and were only evidence of a taking of possession; acts which might amount to it if done with that intention. "The taking of samples and coopering," said Lord

(*a*) ? November.
(*b*) *Dikon* v. *Yates*, 5 B. & Ad. 313.

Denman, "are circumstances from which a jury might infer an act-"ual delivery of the whole. * * * If I had been on the jury "in this case, I should have found there was no such delivery." And the other Judges all in more or less express language said, that the question of whether those acts amounted to taking possession was one of fact, and not of law.

There is a difference to be borne in mind between an absolute authority to take possession, and one that is conditional. Where the authority is absolute, nothing further is requisite to give the purchaser possession of the goods than an assent on the part of the bailee to hold them on his account, and such an assent need not be evidenced by any formal act. It is indisputably shown by a formal transfer in the warehouseman's books, but it is as effectual if expressed by word of mouth, or perhaps even if implied by silence under circumstances which make silence indicative of assent.

*In *Harman* v. *Anderson* (*c*), in 1809, the facts were, that [*345] Dudley bought a quantity of butter then lying in the defendant's warehouses. The sellers gave him a delivery order, which he lodged with the warehousemen. He became bankrupt immediately afterwards, and the sellers, who were unpaid, countermanded the authority to give possession, and the warehousemen, in obedience to this countermand, detained the goods; for this detention the assignees of Dudley brought trover against the warehousemen. At Nisi Prius it was taken as proved that the goods were transferred in the warehouse books before the notice of countermand, and Lord Ellenborough said, "The payment of rent in these cases is a circum-"stance to show on whose account the goods are held, but it is im-"material here, the transfer in the books being of itself decisive. "I am clearly of opinion that the assignees are entitled to recover."

Afterwards, in banc, the defendants produced affidavits to show that one parcel of the butter was not transferred in the books, and that nothing had ever been done by the warehousemen to indicate assent to the transfer of that parcel; but the Court said it made no difference. Lord Ellenborough said, "After the note was delivered "to the wharfingers, they were bound to hold the goods on account "of the purchaser. The delivery note was sufficient without any "transfer in their books."

A precisely similar decision was come to by the Common Pleas in *Lucas* v. *Dorrien* (*d*), in 1817, but the Court, besides giving the same reasons for their decision, went into a discussion concerning the effect of the delivery order before notice to the warehouseman, a question which did not arise in the case.

When the bailee has notice of those circumstances under which he is, in the language of Lord Ellenborough, in *Harman* v. *Anderson* (*c*), "bound to hold the goods for the *purchaser," and [*346] is required to hold the goods accordingly, it is pretty clear that

(*c*) *Harman* v. *Anderson*, 2 Camp. 243.
(*d*) *Lucas* v. *Dorrien*, 7 Taunt. 278.

mere silence is evidence of acquiescence, and it may be a question whether even an express refusal, if wrongful, would have any effect in preserving the vendor's rights. Probably it would, and the question is of the less practical importance as such a refusal would make the bailee liable.

In *Lackington* v. *Atherton* (*e*), in 1844, where Atherton, the vendor, had given a delivery order in his own name to the buyer, which order, when presented to them, the warehousemen refused to accept on the ground that the goods stood in the name of a former owner, and that they had never been transferred into the name of Atherton [the buyer became bankrupt, and Atherton, by means of a delivery order from the former owner, obtained possession], the Common Pleas in an action between Atherton and the assignees of the purchaser, decided that this refusal to deliver possession to the buyer, who really was then entitled to the possession, prevented Atherton's rights as unpaid vendor from being divested, and that a subsequent countermand on the buyer's insolvency was valid; but in this case the refusal of the bailee was so far justified by circumstances, that it would not have been evidence of a conversion by him. His refusal to assent to the transfer of possession without orders from the person who originally deposited the goods with him was not wrongful, though his mere assent to the transfer would have been sufficient to alter the possession.

[In *Tanner* v. *Scovell* (*f*), in 1845, Boutcher and Co. sold to M'Laughlin some glue pieces, and after the arrival of the goods at the defendant's wharf, gave him the following order, addressed to the superintendent of the wharf: "Please weigh and deliver to Mr. M'Laughlin 48 bales of glue pieces." On receipt of this, the defendants weighed the bales and communicated the weight to Boutcher and Co., who thereupon sent to M'Laughlin an invoice stating the weight and price.

[*347] *Subsequently the defendants delivered five of the bales to a purchaser from M'Laughin, on his order. At a later date, in consequence of M'Laughin's failure to pay Boutcher and Co., they ordered the defendants to deliver no more glue pieces. No transfer of the pieces had been made in the defendant's books from Boutcher and Co. to M'Laughlin, nor was any rent charged to him. The Court upheld a verdict for the defendant.

In *Pearson* v. *Dawson* (*g*), in 1858, Askew purchased of the defendant a portion of a cargo of sugar which had been consigned to him *per* 'Orontes,' giving his acceptances in payment. Askew sold 20 hogsheads of the sugar to the plaintiffs, who gave their bill in payment, and gave them the following delivery order addressed to the defendant: "Please deliver to Messrs. Pearson and Hampton

(*e*) *Lackington* v. *Atherton*, 8 Scott, N. S. 38; 7 M. & G. 360; 13 L. J. C. P. 140.

(*f*) *Tanner* v. *Scovell*, 14 M. & W. 28; 14 L. J. Ex. 321.

(*g*) *Pearson* v. *Dawson*, E. B. & E. 448; 27 L. J. Q. B. 248.

or order 20 hogsheads of sugar *ex* 'Orontes.' James Askew." This order was handed to the defendant, who entered the plaintiff's name opposite 20 hogsheads in a book kept by him in which he entered sales and names of purchasers. The sugar was lying in the defendant's name at a bonded warehouse of which the custom house officer had one key and the defendant's warehouse keeper the other. The defendant subsequently delivered 8 of the hogsheads to the plaintiffs on their delivery orders. Askew became insolvent before his bills were paid, and the defendant refused delivery of the remainder. It was held by Lord Campbell, C.J., Coleridge, Erle, and Crompton, J.J., that the plaintiffs were entitled to recover the value of the 12 undelivered hogsheads.]

But when the authority to give possession is conditional, the case is somewhat different. The bailee is not authorized to give possession, nor the purchaser to take it until the conditions are fulfilled. It is not therefore to be presumed, or inferred, that the bailee consents to hold the goods for the purchaser before these conditions are fulfilled, and though an express unconditional assent on his part might, and probably *would, estop him from denying that [*348] the possession was in the purchaser, yet it may be doubted whether even an actual delivery of possession, without fulfilling the conditions, would affect the vendor. But it must be observed that conditions are not necessarily binding, merely because they are expressed in the authority. If by the bargain the purchaser is entitled to an unconditional authority to take possession, the vendor cannot clog that authority with any conditions at his mere pleasure, and even if the purchaser gives his consent to the conditions, that consent is revocable, unless there be some consideration for it. It is therefore necessary, not merely that the authority should be conditional, but that the conditions should be authorized by the contract.

In the case of *Hanson* v. *Meyer* (*h*), in 1805, the contract of sale was by Meyer to Wallace and Hawes of a quantity of starch, at 6*l.* per cwt. The vendor gave a delivery order to the purchasers, addressed to the Bull Porters, in these terms;—"Please to weigh and deliver to Messrs. Wallace and Hawes, all my starch." The warehouseman received the order, and so far obeyed it as to weigh and deliver a part of the starch, then Wallace and Hawes became bankrupt, and the order was countermanded, and the starch taken away by Meyer. The assignees of Wallace and Hawes brought trover against Meyer. It is now decided that by such a bargain the property is not changed (*i*), but at that time it was not so settled, and *Hanson* v. *Meyer* did not decide that point. The case was decided on the ground that the authority to give possession was conditional only. Lord Ellenborough said—"By the terms of the bargain

(*h*) *Hanson* v. *Meyer*, 6 East, 614
(*i*) *Ante*, p. 174 *et seq.*

"formed by the brokers of the bankrupt, two things in the nature "of conditions, or preliminary acts on their part, necessarily pre-"ceded the absolute vesting in them of the property contracted "for. * * * The second, which is the act of weighing, does so in "consequence of the particular terms of this contract, by which the "price is made to depend upon the weight. The weight therefore [*349] * "must be ascertained, in order that the price may be "known and paid, and unless the weighing precede the delivery, it "can never for these purposes effectually take place at all. * * * "This preliminary act of weighing, it certainly never was in the "contemplation of the sellers to waive in respect of any part of the "commodity contracted for. The order to the Bull Porters, his "agents, is to weigh and deliver all his starch. Till it was weighed, "they, as his agents, were not authorized to deliver it, still less "were the buyers themselves, or the present plaintiffs their as-"signees, authorized to take it by their own act from the Bull "Porters warehouse, and if they could not so take it, neither can "they maintain this action of trover. * * * It is unnecessary to "consider what would have been the effect of non-payment of the "price, or the right to the undelivered residue of the starch if the "case had stood merely on that ground, as it did in the case of "*Hammond and others* v. *Anderson* (*k*), where the bacon sold in "that case, was sold for a certain fixed price, and where the weigh-"ing mentioned in that case was merely for the buyer's own satis-"faction, and formed no ingredient in the contract between him "and the seller, though it formed a very important circumstance "in the case, being an unequivocal act of possession and ownership, "as to the whole quantity sold on the part of the buyer."

The circumstance of the weighing being *by the contract* to precede the delivery, distinguishes this case and the cases which follow it (*l*), viz., *Wallace* v. *Breeds* (*m*), *Busk* v. *Davis* (*n*) and *Shepley* v. *Davis* (*o*), from the case of *Swanwick* v. *Sothern*, in 1839. In *Swanwick* v. *Sothern* (*p*) the vendors of corn had given the purchaser a delivery order in the following terms:—"Deliver Mr. J. Marsden 1028$\frac{12}{45}$ bushels of oats, Bin 40, O. W., and you will please [*350] weight them over and charge us *the expense." The warehousemen entered this order in their books. The Queen's Bench came to the conclusion that the contract of sale, which was not distinctly proved, was a sale of the bin of oats for a certain sum, and that the weighing of the oats was not a part of the contract; and that, therefore, the transfer in the books defeated the vendor's rights. It seems impossible to doubt that the delivery order was

(*k*) *Hammond* v. *Anderson*, 1 N. R. 69.
(*l*) *Ante*, pp. 126 and 178.
(*m*) *Wallace* v. *Breeds*, 13 East, 522.
(*n*) *Busk* v. *Davis*, 2 M. & S. 396.
(*o*) *Shepley* v. *Davis*, 5 Taunt. 617.
(*p*) *Swanwick* v. *Sothern*, 9 A. & E. 895.

as conditional as that in *Hanson* v. *Meyer* (*q*), but there the condition was a binding one as part of the bargain; in *Swanwick* v. *Sothern* (*r*), it was not binding on the purchaser, and he chose to waive it.

[In *Godts* v. *Rose* (*s*), in 1855, the vendor, who was the plaintiff, contracted to sell oil to the defendant, to be "free delivered and paid for in 14 days by cash." The plaintiff then gave the wharfinger authority to transfer certain casks of oil into the defendant's name, and received from the wharfinger a notice addressed to the defendant, in which the wharfinger stated that he had transferred the oil into the defendant's name. The plaintiff then sent a clerk to the defendant with the notice, an invoice, and a receipt for the price, with directions to exchange them for a cheque. The defendant obtained possession of the wharfinger's notice of transfer, but refused to give a cheque on the ground that payment was to be made in 14 days. The clerk then went to the wharfinger and countermanded the order. Subsequently, however, the wharfinger delivered the oil to the defendant, thinking that the property had passed to him. The Court, consisting of Jervis, C.J., Williams, Crowder and Willes, JJ., held the meaning of the contract to be, that the seller might deliver the oil at any time within 14 days, and might at the time of delivery require payment, and as the jury had found that the clerk had no intention to part with the property, the plaintiff was entitled to recover.

In *Cooper* v. *Bill* (*t*), in 1865, timber lying on a wharf had been sold by the defendants to Gurney, whose agent measured *the timber, numbered each tree, and marked it with Gur- [*351] ney's initials, and then proceeded to square the timber. On the insolvency of Gurney, the defendants removed the timber to a field in their occupation, and declined to give it up to the plaintiffs, Gurney's assignees. But the Court held that there had been a delivery of the goods to the vendee.]

We shall now return to the subject of stoppage in transitu, properly so called, to which this digression is by no means irrelevant.

The transitus, as its name imports, is whilst the goods are on their passage from the vendor to the buyer, or, has been already said, when they are in the hands of one, who neither hold the possession by a contract of bailment made with the vendor, nor yet as an agent to hold them under the order of the buyer, but only as an agent to forward them from the vendor to the buyer. [As Baron Rolfe said in the case of *Gibson* v. *Carruthers* (*u*), the essence of the doctrine of stoppage in transitu is that "the goods should be

(*q*) *Hanson* v. *Meyer*, 6 East, 614.
(*r*) *Swanwick* v. *Sothern*, 9 A. & E. 895.
(*s*) *Godts* v. *Rose*, 17 C. B. 229; 25 L. J. C. P. 61.
(*t*) *Cooper* v. *Bill*, 3 H. & C. 722; 34 L. J. Ex. 161.
(*u*) *Gibson* v. *Carruthers*, in 1841; 8 M. & W. 328; 11 L. J. Ex. 138. See also *Schotsman* v. *Lanc. and York. Ry. Co.*, in 1867; 2 Ch. Ap. 335; 36 L. J. Ch. 361.

"in the custody of some third person, intermediate between the "seller who has parted with and the buyer who has not yet ac-"quired actual possession."]

There are many cases in which it is quite clear in which capacity the goods are held. No one could for a moment doubt, that goods in the hands of a public carrier, either by land, or by water, and actually on the journey, are in transitu; it is self evident as a matter of fact, that the carrier under such circumstances, holds them merely as an agent to forward. And it is equally clear that goods travelling on the same journey in the buyer's own cart or barge, which he had sent for them are not in transitu; for the carter or bargeman is clearly the buyer's servant, and not an agent to forward from the vendor. But there is sometimes a good deal of difficulty in drawing the boundary line between the carrier and the servant, [*352] as, for instance, in ascertaining the character of *the captain, where the buyer does not send his own vessel to fetch the goods, but employs a ship belonging to a third party on that particular errand. In two important cases, *Inglis* v. *Usherwood* (*x*), in 1801, and *Bohtlingk* v. *Inglis* (*y*), in 1803, it was at first taken for granted, that a delivery of goods on board a vessel chartered by the buyer, was a delivery to the buyer himself, but afterwards the Court held and decided that it was but a delivery to an agent to forward, and that the goods on board the ship were in transitu. How this may be, seems to depend on the nature of the contract between the shipowner and the charterer.

In the majority of cases, the shipowner does not part with the possession of the vessel to the charterer, he does no more than contract to employ the vessel and the services of the master and crew for a time, exclusively for the benefit of the charterer; so that the master remains the servant of the shipowner, and not of the charterer, and his possession is the possession of the shipowner, and not of the charterer in any case in which their rights come in question. But though this is the usual contract between the shipowner and the charterer, they may in law, and in practice sometimes do agree, that the charterer shall during the voyage have the possession of the vessel, and that the master shall during that time be the servant of the charterer. In other words, though a charter party usually is a contract on the part of the shipowner, to use the ship and the services of the master and crew, in a particular manner, it may amount to a demise of the vessel, and of the services of the master and crew. The distinctions on which it depends, which is the construction of the charter party, may be found in Abbott on Shipping (*z*).

When, therefore, goods are put into the possession of the master of a ship, they are in general in the possession of the shipowner, who,

(*x*) *Inglis* v. *Usherwood*, 1 East, 515.
(*y*) *Bohtlingk* v. *Inglis*, 3 East, 381.
(*z*) Abbott on Shipping, Part IV., Chap. I.

as it is evident, is an agent to forward the goods, and therefore goods on shipboard in general are in *transitu; but where [*353] the master is not the servant of the shipowner, but the immediate servant of the charterer, the goods, by being put into possession of the master, are put in the possession of the charterer, and, therefore, if the charterer be also the purchaser, they are no longer in transitu. "So," says Lord Tenterden in *Abbott on Shipping* (*a*), "as I have before observed, the master of a ship chartered wholly by "the consignee is now held to be a carrier, in whose hands goods may "be stopped (*b*). But where a ship had been hired by the con-"signee for a term of years, and was fitted out, victualled, and "manned by him, and goods were put on board thereof to be sent "by him on a mercantile adventure, for which he had bought them, "it was held that the consignor could not stop them: the consignee "being in that case the owner of the ship *pro tempore*, and the de-"livery of goods on board thereof being equivalent to a delivery "into a warehouse belonging to him, and the transit being in effect "a transit from, and not to him. *Fowler* v. *MacTaggart* (*c*)."

It is not of any importance in point of law whether the goods are actually on a journey or not, for if the goods are deposited with one who holds them merely as an agent to forward, and has the custody as such, they are as much in transitu as if they were actually moving; but in general there is more difficulty in ascertaining as a fact in what capacity goods are deposited, than in what capacity they are carried. The acts accompanying the transport of goods are less equivocal, less susceptible of two interpretations as to the character in which they are done, than are those accompanying a deposit of goods. The question, however, is still the same; has the person who has the custody of the goods got possession as an agent to forward from the vendor to the buyer, or as an agent to hold for the buyer?

*In *Leeds* v. *Wright* (*d*), in 1803, where an agent of the [*354] bankrupt purchased the goods on account of the bankrupt for exportation, but had authority from the bankrupt to export them to any port he pleased, the Court of Common Pleas held that he was not an agent to forward, and that goods in his hands were not in transitu. And in *Scott* v. *Pettit* (*e*), in the same year, where the bankrupt had given general orders to a carrier to send all good for him to the defendant's house to be packed, and the goods were accordingly sent to his house, the same Court decided that there being no fixed ulterior destination, the packer must be considered not as an agent to forward, but as one to hold the goods subject to

(*a*) Abbott on Shipping, Part IV., Chap. II., 10th ed., p. 400.
(*b*) *Bohtlingk* v. *Inglis*, 3 East. 381. See also *Berndtson* v. *Strang*, 3 Ch. Ap. 590; 37 L. J. Ch. 665.
(*c*) Cited in 7 T. R. 442.
(*d*) *Leeds* v. *Wright*, 3 B. & P. 320.
(*e*) *Scott* v. *Pettit*, 3 B. & P. 469.

the buyer's orders, like a warehouseman, and, consequently, that on their delivery to the defendant the transitus was ended. Shortly after the decision of these cases, the point arose in *Dixon* v. *Baldwin* (*f*), in 1804, in which case goods were ordered by the insolvent "to be forwarded to Metcalfe at Hull, to be shipped for Hamburgh as usual," and it was proved that it was usual for Metcalfe to keep such goods till he received orders from the insolvents, and then to do with them whatever the insolvents ordered. The King's Bench decided that the goods in Metcalfe's hands were not in transitu. Lord Ellenborough reviewed most of the previous cases, and approved of the principle of *Scott* v. *Pettit* (*e*), which he said was, "that the transitus of goods is only not at an end on their reaching "the packer, where they remain with him for the purpose of being "forwarded on to some ulterior appointed place of destination; but "here, as in those cases, the goods had so far gotten to the end of "their journey, that they waited for new orders from the purchaser "to put them again in motion, and that without such orders they "would continue stationary." Grose, J., differed from the rest of [*355] the Court upon this point, and thought the transitus *at an end; but all four Judges agreed upon another point, which decided the cause.

It is worth while to observe, that the marginal note in *East's Reports* is not a correct abstract of what was really decided. The marginal note states the case to be, that goods "sent to Metcalfe to be forwarded to Hamburgh" were not in transitu; but Lord Ellenborough's judgment proceeds on the express ground that it was proved that the goods were sent to Metcalfe, *not* to be forwarded to Hamburgh, but to await for orders from the purchaser (*g*).

In *Smith* v. *Goss* (*h*), in 1808, at Nisi Prius, Lord Ellenborough decided that where goods had been ordered "to be sent addressed to the care of Goss, Bull's Wharf, London, with directions to send them by the first vessel to Newcastle," they were in transitu in Goss's hands.

And in *Coates* v *Railton* (*i*), in 1827, where the course of business was for Railton, who was a packer, warehouseman, and commission agent at Manchester, to purchase goods in the name of Butler, of London, and send them to a branch of that house at Lisbon, and the goods which were so ordered were delivered at Railton's warehouse, the King's Bench considered that Railton had held the custody merely as one step in the transitus to Lisbon. These cases are, it will be observed, quite in accordance with Lord Ellenbor-

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(*f*) *Dixon* v. *Baldwin*, 5 East, 175.

(*g*) *Dodson* v. *Wentworth*, 4 M. & G. 1080, in 1842; *Wentworth* v. *Outhwaite*, 10 M. & W. 436, in 1842; 12 L. J. Ex. 172.

(*h*) *Smith* v. *Goss*, 1 Camp. 282.

(*i*) *Coates* v. *Railton*, 6 B. & C. 422.

ough's judgment in *Dixon* v. *Baldwin* (*k*), though opposed to the marginal note in that case (*l*).

[In *Tucker* v. *Humphrey* (*m*), in 1828, flour was shipped to the wharf of the defendant, who was in the habit of storing flour in his warehouses for the purchaser. The vendor stopped *the [*356] flour before it had been landed, while the vessel was lying alongside the wharf, and the stoppage was held good.]

In *Jackson* v. *Nichol* (*n*), in 1839, it was proved that Crawhall, an agent of the insolvents, who purchased goods for them at Newcastle, was in general in the habit of receiving the goods into his possession to abide the insolvents orders. In this particular instance, however, before the goods were out of the vendor's posses sion, the insolvents had directed Crawhall to forward the goods to them in London. The vendors then gave a delivery order to Craw hall, who endorsed it to a wharfinger with a special indorsement "to go on board the 'Esk.'" The wharfinger handed the order to a keelman, who got the goods and put them on board the 'Esk.' The 'Esk' sailed for London, and moored in the Thames. The de fendants, who were wharfingers, received the goods on board a lighter, and then they were stopped by the plaintiffs, who were unpaid vendors; and the Court held that the goods were still in transitu, because every step taken was but "a link in the chain of the ma "chinery, by which the goods were to be put in motion." Tindal, J., said, "that if the goods had ever come into the possession of Craw "hall as the agent of the buyers, there to remain till the agent "received orders for their ulterior destination, such possession "would have been the constructive possession of the buyers them "selves, and the right to stop in transitu would have been at an "end."

[In *Valpy* v. *Gibson* (*o*), in 1847, a case resembling *Dixon* v. *Baldwin* (*p*), goods had been sent by the defendants, the vendors, at the request of Brown the purchaser, to Leech and Co., of Liver pool. The report is not by any means clear as to what was the pre cise nature of the relationship of Leech and Co. to Brown, but they appear to have been employed by him prior to this transaction to forward goods to Valparaiso, but not to have received instructions from him to forward the goods in question.

*Leech and Co. received the goods from the defendants, [*357] together with a letter stating that they were for shipment to Val paraiso, and Leech and Co. had them put on board, and subse quently relanded them by order of Brown and returned them to the

(*k*) *Dixon* v. *Baldwin*, 5 East, 175.

(*l*) See remarks of Brett, L.J.; on this case in *Kendal* v. *Marshall, Stevens & Co.*, 11 Q. B. D. 366; 52 L. J. Q. B. 313.

(*m*) *Tucker* v. *Humphrey*, 4 Bing. 516. See also *Rodger* v. *Comptoir d'Escompte de Paris*, L. R. 2 P. C. 393; 38 L. J. P C. 30.

(*n*) *Jackson* v. *Nichol*, 5 Bing. N. C. 508.

(*o*) *Valpy* v. *Gibson*, 4 C. B. 837

(*p*) *Dixon* v. *Baldwin*, 5 East. 175.

vendors to be repacked. Brown became insolvent without having paid for the goods, and the vendors asserted a right to retain them until payment had been made. The plaintiffs were Brown's assignees. Wilde, C. J., delivering the judgment of the Court for the plaintiffs, said, "That although the defendants knew that the "goods were to be sent to Valparaiso, and so informed Leech and "Co., yet Leech and Co. could not forward the goods simply on "that information, but held them subject to such orders as the "buyer might give, and the transitus was consequently at an end "as soon as the goods came to their hands. And further, that in-"dependently of this Brown had, by relanding the goods, dealt "with them as owner, and that alone was sufficient to put an end "to the transitus" (*q*).

In cases of stoppage in transitu the question is not whether the property has or has not passed for even if it has passed the vendor may have the right to retake the goods, but is, in what capacity did the captain receive the goods, whether as the servant of the vendee, or as an agent to carry.

In the following cases it was argued that the goods had necessarily been delivered to the vendee, because they had been placed on board his ship or a ship chartered to him.

In the case of *Van Casteel* v. *Booker* (*r*), in 1848, Barton and Co., of Liverpool, sent their own ship laden with coals to Lyon, Schwind and Co. at Rio, who sold the coals and, partly with the proceeds but mainly with their own funds, purchased coffee, which they put on board the same ship, sending an invoice to Barton and Co., in which the coffee was stated to have been shipped by order for account and at the risk of Barton and Co. On the back of the invoice was an account in which they credited themselves with the [*358] *invoice price of the coffee and debited themselves with the proceeds of the coal, and they drew on Barton and Co. for the balance. They took the bill of lading deliverable to order or assigns, "he or they paying freight *free*" (the word "free" was inserted in writing into a printed form), and sent it indorsed in blank to Barton and Co. Barton and Co. were heavily indebted to their bankers, and had been threatened by them with certain proceedings. These facts came to the knowledge of Lyon, who was the Liverpool agent of Lyon, Schwind and Co. He pressed Barton and Co., and they agreed that when the bills of lading came to hand they should be given to Haynes Higginson to hold them to the order of Lyon as security against the bills of exchange drawn against the coffee. On the 11th of November Barton and Co. became bankrupt. The bill of lading arrived on the 12th, and, pursuant to the agreement, was delivered by Barton and Co. to Haynes Higginson who handed it to Lyon, and he pledged it with the plaintiffs. When the cargo

(*q*) See also *Foster* v. *Frampton*, 6 B. & C. 107.
(*r*) *Van Casteel* v. *Booker*, 2 Ex. 691; 18 L. J. Ex. 9.

arrived it was taken possession of by a messenger from the defendants who were the assignees of Barton and Co., and the captain was served with two notices, one from the plaintiffs claiming the cargo as indorsees of the bill of lading, and the other from Lyon, who claimed to stop the goods in transitu as the agent of the unpaid vendors. Lyon appears to have been acting in this on the plaintiff's behalf.

Baron Rolfe told the jury that there could be no right to stop in transitu, as delivery on board the consignee's own ship amounted to a taking possession.

On granting a new trial, Parke, B., delivering the considered judgment of the Court pointed out that the form of the bill of lading was not conclusive to restrain the effect of delivery on board the consignee's own vessel.

He said: "The contract for carriage, which the bill of lading is, "is made expressly with the consignor, and he no doubt might sue "upon it, though in making it he was really acting as agent of, and "for the consignee. But if he made it as agent for and on behalf "of the consignee, the consignee also, as being the real principal, "might sue, if *there had been a breach of the contract to [*359] "carry. Notwithstanding the form of the bill of lading, therefore, the "contract may have been made really on behalf of the vendee, "though *primâ facie* it is made on behalf of the vendor; and it is a "question for the jury, to be decided on the evidence, looking at the "form of the bill of lading, particularly noticing that it is made "freight free, and the language of the invoice, and the immediate "transfer of the bill of lading to the bankrupts, and other facts, "whether the goods were not really delivered on board to be carried "for and on account and at the risk of the bankrupts."

In the case of *Schotsman* v. *Lancashire and Yorkshire Railway Co.*, (*s*), in 1867, Lord Chelmsford, L. C., said that the delivery in the purchaser's own ship is a final delivery at the place of destination unless the vendor restrains the effect of such delivery. In this case the goods were delivered on board a vessel belonging to the consignee, and the bills of lading had been taken making the goods deliverable to the consignee or assigns. It was admitted that the property had passed to the consignee, and the question was, was there a delivery? and it was held that there was.

Berndtson v. *Strang* (*t*), in 1868, was a case in which timber in Sweden had been delivered on board a vessel chartered to the purchaser. The bill of lading was indorsed and handed over to the purchasers in exchange for their acceptance. The purchasers insured the timber. On their insolvency the goods were stopped in transitu when the ship arrived in England. Lord Cairns, L. C., said this was a charter of an ordinary kind which did not make the

(*s*) *Schotsman* v. *Lanc. and York. Ry. Co.*, 2 Ch. Ap. 337, in 1867; 36 L. J. Ch. 361.

(*t*) *Berndtson* v. *Strang*, L. R. 4 Eq. 481; 3 Ch. Ap. 588; 37 L. J. Ch. 665.

purchasers, even for a time, the owners or hirers of the ship, but merely operated as by way of contract with the owners of the ship, that they would carry timber to a particular port, and that the timber was in the custody of a person intermediate between the seller who had parted with, and the buyer who had not obtained actual [*360] possession; and held *that the stoppage was good. This case was followed in the case of *Ex parte Rosevear China Clay Co., In re Cock* (*u*), in 1879, where the facts were very similar.

In *Fraser* v. *Witt* (*x*), in 1868, a cargo was consigned from Bahia to a firm in Glasgow, the bill of lading stated that the ship was "bound for Falmouth, Cowes, or Queenstown for orders." When the ship arrived at Falmouth the master asked the consignor's agents in London for orders: they applied to the Glasgow firm for instructions as to the destination of the ship; but before they received them the Glasgow firm became insolvent, and the goods were stopped. Lord Romilly, M. R., held that there had been no constructive delivery, and that the stoppage was good.

In *Ex parte Gibbs* (*y*), in 1875, the course of dealing between the vendors in America and Whitworth and Co. of Halifax was as follows. Cotton was consigned by the vendors to Brown and Co., their agents in Liverpool, to whom they forwarded the bill of lading together with a bill of exchange drawn on Whitworth and Co. When Whitworth and Co. had accepted the bill they received the bill of lading from Brown and Co., and having indorsed it, sent it to the Manager of the Lancashire and Yorkshire Railway Co. at Liverpool. The Railway Co., then paid the freight, got possession of the cotton, and forwarded it from Liverpool to a station near Halifax, where it was put into a siding adjoining Whitworth and Co.'s works. It was held by Beacon, V.-C., that the transitus was at an end at Liverpool, when the cotton was delivered to the purchaser's agent.

In *Ex parte Watson* (*z*), in the Court of Appeal, in 1877, Watson and Love agreed that Watson should send goods to Rothwell and Co., of Shanghai, for sale, and draw on Love for the price. Watson employed Copperthwaite, a packer at Bradford, to pack the [*361] goods and forward them to London for *shipment. Copperthwaite wrote to Love that he was waiting for forwarding instructions. Love gave him instructions to send them on board the 'Gordon Castle' loading in the Thames for Shanghai, and the goods were forwarded by rail to London marked "Shanghai." The Railway Co. then advised Love that the goods were lying at one of their London stations and asked for instructions. The goods were put on board the 'Gordon Castle,' and bills of lading made out to

(*u*) *Ex parte Rosevear China Clay Co.*, 11 Ch. D. 560; 48 L. J. Bank. 100.
(*x*) *Fraser* v. *Witt*, L. R. 7 Eq. 64.
(*y*) *Ex parte Gibbs*, 1 Ch. D. 101; 45 L. J. Bank. 10.
(*z*) *Ex parte Watson*, 5 Ch. D. 35; 46 L. J. Bank. 97. See also *Ex parte Miles, In re Isaacs*, 15 Q. B. D. 39.

the order of Love or his assigns, but remained in the possession of the shipowners until Love became bankrupt. It was held by James, Baggallay, and Bramwell, L. J.J., that the transitus continued from Bradford to Shanghai.

In *Ex parte Barrow* (*a*), in 1877, goods sent from London to Falmouth by ship were delivered on the quay at Falmouth and taken to the warehouse of Carne, who acted as the shipping company's agent to receive the goods. Carne's course of business was to let the consignee know that the goods were lying in his warehouse at the consignee's risk, and would be delivered on payment of freight and charges. In this case when the goods were landed the purchaser had absconded and Carne therefore gave no notice. Bacon, V. C., held that Carne had never become the purchaser's agent to hold the goods for him, and the transitus was not at an end.

In *Ex parte Cooper* (*b*), in 1879, in the Court of Appeal, a cargo of iron castings was consigned by the vendors in Scotlond in a vessel chartered by them, to McLaren and Co. in London. McLaren was a partener in both the Scoth and English firms. When part of the goods had been placed on board a barge belonging to the English firm, McLaren, who was in Scotland and knew of the insolvency of both firms, sent a telegram to the manager of the English firm to stop unloading. At this time the Scotch firm was considerably in debt to the London firm. It was argued for the trustee of the London firm that the notice of stoppage in transitu should have been given to the master of the ship, and that the *stop- [*362] page amounted to a fraudulent preference of the Scoth firm, and that the delivery of part of the cargo operated as delivery of the whole. But it was held by James, Brett, and Cotton, L. JJ., that the stoppage was good.

In *Ex parte Golding Davis and Co.* (*c*), in 1880, Golding and Co. sold caustic soda to Knight and Sons, to be delivered in monthly quantities, "shipment f.o.b. Liverpool. Price 14*l.* per ton," and received instructions from them to ship the soda at Liverpool on board the 'Larnaca,' for New York. Golding and Co. followed the instructions, and the bills of lading making the soda deliverable at New York to Taylor and Sons (to whom Knight and Sons had re-sold it), were sent to Knight and Sons. Golding and Co. heard of Knight and Sons' insolvency and stopped the soda before the 'Larnaca' sailed. The Court of Appeal held that the stoppage was good. The letters f.o.b. merely determine that the cost of shipment shall fall on the vendor.

In *Ex parte Falk* (*d*), in 1880, where salt was consigned to Cal-

(*a*) *Ex parte Barrow*, 6 Ch. D. 783; 46 L. J. Bank. 71.

(*b*) *Ex parte Cooper*, 11 Ch. D. 68.

(*c*) *Ex parte Goldiny Davis & Co.*, 13 Ch. D. 628. See also *Ex parte Rosevear China Clay Co.*, 11 Ch. D. 560; 48 L. J. Bank. 100.

(*d*) *Ex parte Falk*, 14 Ch. D. 446, *post*, p. 407, where the facts are set out at some length.

cutta, the vendor served a notice of stoppage in transitu on the shipowners in Liverpool, and they telegraphed to Calcutta. A day or two later the vendor telegraphed to Calcutta to stop the salt. Bramwell, L.J., seems to have been of opinion that the shipowners were not under any obligation to stop the goods, and that there was no good stoppage under the circumstances until the vendor himself telegraphed. But in the House of Lords Lord Blackburn took a contrary view (*e*).

Kendal v. *Marshall, Stevens and Co.* (*f*), in the Court of Appeal, in 1883, shows how extremely difficult it is to determine at what point the transitus ends. Leoffler verbally contracted with Ward and Son of Bolton to purchase cotton waste. Nothing was said as to the place of delivery. Leoffler then arranged with Marshall, [*363] Stevens and Co., shipowners, *that the goods shall be sent to them at Garston and forwarded to Rouen. When the goods were ready, Ward and Son asked Leoffler where they should send them. Leoffler replied,—send them to Marshall, Stevens and Co., Garston. And on the same day he directed Marshall, Stevens and Co., to forward them to Rouen. Ward and Son delivered the goods to the L. & N. W. Ry. Co. at Bolton to be forwarded to Marshall, Stevens and Co. at Garston. A day or two afterwards the railway company gave notice to Marshall, Stevens and Co. that the goods had arrived, and that if delivery were not taken in due course, the railway company would hold them as warehousemen and charge rent. The goods remained in the goods shed for some days, and on the insolvency of Loeffler were stopped by Ward and Co. Leoffler's assignee claimed them. Matthew, J., held that the transitus was not at an end, but the Court of Appeal, consisting of Brett, Cotton. and Bowen, L. JJ., took the opposite view. The facts that Leoffier had never directed Ward and Co. to send the goods to Rouen, nor to deliver them to Marshall, Stevens and Co. in order to be forwarded to Rouen, seem to have had very great weight with the Court of Appeal (*g*): as Lord Justice Bowen put it, it was no part of the bargain between the vendor and the vendee that the transit should last up to a certain time.

Those cases decided under the Statute of Frauds (*h*) as to what amounts to an actual receipt may have some bearing on this subject. They are not cases of stoppage in transitu, but are authorities to show under what circumstances the goods have to be held to have been delivered to the purchaser.]

In none of these cases of stoppage in transitu, it may be observed, was there any doubt as to the law; the question was one of fact, viz., in what capacity did the different agents hold possession, [whether as an agent to forward, or as an agent to hold for the

(*e*) *Kemp* v. *Falk*, 7 Ap. Ca. 585.
(*f*) *Kendal* v. *Marshall, Stevens & Co.*, 11 Q. B. D. 351; 52 L. J. Q. B. 313.
(*g*) See also *Ex parte Miles, In re Isaacs*, 15 Q. B. D. 39.
(*h*) *Ante*, p. 25

buyer]? This question becomes still more difficult to answer where the party holding the goods *acts in two capacities, as, for [*364] instance, a carrier, who also acts as a warehouseman, and who may, therefore, have goods in his warehouse either as a place of deposit connected with the carriage, or as a place of deposit subject to the orders of the buyer; or a wharfinger, who sometimes receives the goods as agent to the shipowner, and sometimes as agent to the consignee. In all such cases as the leading fact, viz., the possession of the goods, is in itself ambiguous, it is necessary to gather the intention of the parties from their minor acts.

[In *Rowe* v. *Pickford* (*i*), in 1817, a trader in London was in the habit of purchasing goods at Manchester, and of exporting them to the Continent soon after their arrival in London. He had no warehouse in London, and the goods consigned to him usually remained in the waggon office of the defendants, who were carriers, until they were removed for the purpose of being shipped. A parcel of goods lying at the office at the time of the vendee's bankruptcy was held to be no longer in transitu.

And this is more clearly the case where the purchaser has dealt with the goods lying in the carrier's warehouse as his own (*k*).]

As was before stated, if the possessor of the goods has the intention to hold them for the buyer, and not as an agent to forward, and the buyer intends the possessor so to hold them for him, the transitus is at an end; but I apprehend that both these intents must concur, and that neither can the carrier of his own will convert himself into a warehouseman, so as to terminate the transitus, without the agreeing mind of the buyer. *James* v. *Griffin* (*l*). Nor can the buyer change the capacity in which the carrier holds possession without his assent, at least until the carrier has no right whatsoever to retain possession against the buyer. *Jackson* v. *Nichol* (*m*).

In *James* v. *Griffin* (*l*), in 1837, the bankrupt had often *used Beale's wharf as his warehouse for lead; being in [*365] insolvent circumstances, he did not wish to accept a cargo of lead purchased by him, but not paid for; but in order to set the ships free, he told the captain to land it on Beale's wharf. He intended this not to be a delivery to himself, but he did not communicate his intention to the wharfingers, and they seem to have considered themselves as agents to hold possession for him: then the goods were stopped. The Court of Exchequer all agreed that the question was, whether the possession of Beale's wharfingers was the possession of the bankrupt or not; but Lord Abinger thought that the intention in the bankrupt's mind not being expressed to the wharfingers was quite immaterial, and that the transitus was at an end.

(*i*) *Rowe* v. *Pickford*, 8 Taunt. 83.
(*k*) *Foster* v. *Frampton*, 6 B. & C. 107.
(*l*) *James* v. *Griffin*, 2 M. & W. 623.
(*m*) *Jackson* v *Nichol*, 5 Bing. N. C. 508.

Parke, Bolland, and Alderson, Barons, held that, except as a test of its reality, it did not matter whether he communicated the intention or not, and the transitus was by them held to continue. In that case the holder of the goods meant to hold them for the buyer; but that did not render his possession the constructive possession of the buyer, because the buyer's assent was wanting.

[In *Heinekey* v. *Earle* (*n*), in 1857, the plaintiff had consigned hemp to Horn in Sunderland, where it arrived on the 2nd of February, and Horn, finding himself insolvent, and being anxious not to receive the hemp, on the following day instructed his manager to go to the wharf where the hemp was lying and countermand the delivery. The hemp, notwithstanding these instructions, was delivered at Horn's works during his absence, and Horn stopped payment in the evening. He consulted a solicitor as to whether he could return the hemp, and was advised he could not do so. On the 6th the vendor demanded the hemp from Horn. It was held, reluctantly, by the Court of Queen's Bench, and the judgment was affirmed in the Exchequer Chamber, that although the goods had not ceased to be in transitu, merely because they were on Horn's premises, yet the transitus had ceased under the circumstances, [*366] Horn having assented to *their remaining there before the 6th, the date when the plaintiffs demanded them.

In the case of *Bolton* v. *The Lancashire and Yorkshire Railway Co.* (*o*), in 1866, both the vendor and the vendee repudiated the ownership of certain goods lying at a station on the defendant's line, until the vendee became bankrupt, when his assignee made a claim to them. The real question was, whether the company held the goods as the bailee of the vendee, or merely as an agent to forward. Parsons had purchased eleven skips of cotton twist from Wolstencroft, and after taking three of them declined to receive any more. Wolstencroft sent the remaining eight to Brierly, a station on the defendant's line, and instructed the defendants to deliver them to Parsons. Parsons' carter took four of them away by mistake, and Parsons returned them at once, and then consigned the whole eight back to Wolstencroft at Salford; but Wolstencroft refused to receive them, and sent them to Brierly a second time, where Parsons again refused to have anything to do with them. Subsequently Wolstencroft instructed the railway company not to deliver the goods to Parsons, and obtained possession of them. The Court held that Wolstencroft had effectually stopped the goods. Erle, C.J., said, "As to the four which were taken by the carman "to his mill, they were so taken without his orders, and against his "will; it was just the same as if they had been carried by a wrong "doer. It was urged by Mr. Holker, that, being repudiated by "both parties to the contract, the goods remained in the hands of "the railway company as warehouseman for the real owner, that is,

(*n*) *Heinekey* v. *Earle*, 8 E. & B. 410; 28 L. J. Q. B. 79.
(*o*) *Bolton* v. *Lanc. & York. Ry. Co.*, L. R. 1 C. P. 431; 36 L. J. Ch. 361.

"for Parsons. There is no doubt but that the carrier may and "often does become a warehouseman for the consignee; but that "must be by virtue of some contract or course of dealing between "them, that, when arrived at their destination, the character of "carrier shall cease, and that of warehouseman supervene. Here, "however, there is no evidence of any such contract or course of "dealing."]

*In *Jackson* v. *Nichol* (*p*), in 1839, the bankrupt re- [*367] peatedly demanded the goods from the holders before any stoppage in transitu, but they refused to give them up, and the Court of Common Pleas held that the goods had not come to the possession of the bankrupt. There the assent of the actual holder was wanting, and it seems to have been the only thing wanting, to put an end to the transitus.

So also in *Lackington* v. *Atherton* (*q*), in 1844, where the purchaser before his insolvency demanded the goods from the warehousemen, but they refused to deliver them on account of an informality in the delivery order, the Common Pleas held that there was no possession taken by the purchaser so as to determine the vendor's rights. In that case, had the warehousemen assented to the informal delivery order, they would have given possession to the purchaser; and the case, therefore, seems the converse of *James* v. *Griffin* (*r*), as in the one case the bailee of the goods meant to hold them for the purchaser, who did not assent, and in the other the purchaser required the bailee to hold them for him, but the bailee did not assent.

The agent to forward may very well agree to hold the goods as an agent to keep the goods, without thereby abandoning any lien which he may have in the capacity of carrier, for freight or otherwise. He may in substance say, "I will hold the goods for you, and at your disposal, but neither you nor any one else shall take them away without paying my charges;" and if such an agreement is come to, the transitus is ended. It is, therefore, no conclusive test of a transitus or none, whether the buyer has acquired an immediate right to the possession or not, though it may afford strong evidence as to the nature of the actual holder's possession, which it is conceived depends upon mutual intention.

[In *Whitehead* v. *Anderson* (*s*), in 1842, the assignees of *the [*368] bankrupt purchaser of a cargo of timber to arrive at Wyrewater, directed Benbow to take possession, and accordingly, as soon as the ship arrived, Benbow went on board and told the captain that he had come to do so. To this the captain made no reply, but invited him into the cabin, into which the ends of the timber projected, and there Benbow saw and touched them. The captain subsequently

(*p*) *Jackson* v. *Nichol*, 5 Bing. N. C. 508, *ante*, p. 356.
(*q*) *Lackington* v. *Atherton*, 8 Scott, N. S. 38; 7 M. & G. 360; 13 L. J. C. P. 140.
(*r*) *James* v. *Griffin*, 2 M. & W. 624, *ante*, p. 364.
(*s*) *Whitehead* v. *Anderson*, 9 M. & W. 518; Tudor's L. C. Merc. Law, 632.

said he would deliver the cargo to Benbow when he was satisfied about the freight, but he did not consent to deliver immediate possession, or to waive his lien for freight. They then went ashore. The vendor's agent went on board afterwards, and told the mate that he had come to stop the goods, and the defendants, who were the vendor's agents, subsequently obtained possession. The Court held that what took place between Benbow and the captain did not amount to a constructive possession by the vendees, and gave judgment for the defendants.]

Parke, B., in delivering the judgment of the Court, states the law on this point thus: "The law is clearly settled that the unpaid "vendor has a right to retake the goods, before they have arrived "at *the destination originally contemplated by the purchaser*, unless in "the mean time they come to the actual or constructive possession "of the vendee. If the vendee take them out of the possession of "the carrier into his own, with or without the consent of the car-"rier, there seems to be no doubt that the transit would be at an "end; though in the case of the absence of the carrier's consent, it "may be a wrong to him for which he would have a right of action. "This is a case of actual possession, which certainly did not occur "in the present instance. A case of constructive possession is where "the carrier enters, expressly or by implication, into a new agree-"ment distinct from the original contract for carriage, to hold the "goods for the consignee as his agent; not for the purpose of ex-"pediting them to the place of original destination pursuant to that "contract, but in a new character, for the purpose of custody on "his account, and subject to some new or further order to be given [*369] "to him. It appears to us very doubtful, whether *an act "of marking or taking samples, or the like, without any removal "from the possession of the carrier, though done with the inten-"tion to take possession, would amount to a constructive posses-"sion, unless accompanied by such circumstances as to denote that "the carrier was intended to keep and assented to keep the goods "in the nature of an agent for custody. In the case of *Foster* v. "*Frampton* (*t*), it is clear there were such circumstances: whether "in that of *Ellis* v. *Hunt* (*u*), is doubtful; but it is unnecessary to "determine this point, as there is no finding in this case, even of "any act done to the timber, with intent to take possession. It is "said, indeed, that the agent of the assignees touched the timber, "but whether by accident or design is not stated. There being "then no such act of ownership, it seems to us, that unless by con-"tract with the captain, express or implied, the relation in which "he stood before as a mere instrument of conveyance to an ap-"pointed place of destination was altered, and he became the agent "of the consignee for a new purpose, there was no constructive "possession on the part of the vendee."

(*t*) *Foster* v. *Frampton*, 6 B. & C. 107.
(*u*) *Ellis* v. *Hunt*, 7 T. R. 46.

In the judgment in *Whitehead* v. *Anderson* (*x*), which was evidently prepared with great care, it is probable that every word is significant. It is, therefore, to be considered what was intended by the phrase, "the destination originally contemplated by the purchaser." If goods are delivered at a wharf or inn without any statement as to whether they were to be received as a step on their progress towards the buyer, by force of the original delivery to the carrier, or in order to be held until the buyer gives fresh orders, and the wharfinger or innkeeper accept the goods with the intention of acting in the capacity in which he should discover they were meant to be delivered to him; the capacity in which he held the goods would apparently depend entirely on what was the desti- [*370] nation *intended by the purchaser; and if the purchaser sent him directions to forward the goods, the question whether he was acting under the control of the purchaser, as in *Dixon* v. *Baldwin* (*y*), or merely as an agent to forward, as in *Coates* v. *Railton* (*z*), would probably depend on what was the original destination; but it seems pretty clear that the mere arrival at the spot where the purchaser meant them to be taken possession of, does not in itself terminate the transitus, unless there is something amounting to a delivery of possession, or an agreement to change the character of the custody. In *James* v. *Griffin* (*a*) the goods were deliverable *in the river*, yet the transitus was not ended, even by landing the goods on the wharf, because there was wanting an intention to take possession. In *Crawshay* v. *Eades* (*b*), in 1823, the goods were partially landed on the purchaser's, wharf but yet the transitus washeld not at an end, because it was not the intention of the carrier to give the purchaser possession. It would seem, therefore, that the destination originally contemplated by the purchaser is exceedingly material, to explain the capacity in which an agent holds possession where that is ambiguous, but not otherwise.

[In *Coventry* v. *Gladstone* (*c*), in 1868, the consignee of a cargo pledged the bill of lading with the plaintiffs, who on receiving notice of the arrival of the ship presented it to the ship's brokers and obtained an "overside" order for the delivery of the cargo, and sent it by their lighterman to the ship. The lighterman presented it to the ship's officer, who said that as soon as the cargo could be got at, it should be delivered to him. Subsequently the goods were stopped, and Sir W. Page Wood, V.-C., held that the stoppage subject to the mortgage was good.]

The doctrine that acts, such as taking possession of part of the goods, taking samples or the like, have not in themselves *as [*371]

(*x*) *Whitehead* v. *Anderson*, 9 M. & W. 518, *ante*, p. 367.
(*y*) *Dixon* v. *Baldwin*, 5 East, 175, *ante*, p. 354.
(*z*) *Coates* v. *Railton*, 6 B. & C. 422, *ante*, p. 355.
(*a*) *James* v. *Griffin*, 2 M. & W. 623, *ante*, p. 364.
(*b*) *Crawshay* v. *Eades*, 1 B. & C. 181.
(*c*) *Coventry* v. *Gladstone*, L. R. 6 Eq. 44; 37 L. J. Ch. 492.

a matter of law any effect on the character in which the possession of the residue is held, but are no more than evidence showing the intention of the parties as to the capacity in which that possession is to be held, has been more than once acted upon. In *Jones* v. *Jones* (*d*) the Court of Exchequer decided that the acts of taking possession of part were equivocal, and in that case amounted to taking possession of the whole. In *Dixon* v. *Yates* (*e*), the King's Bench decided that under the circumstances of that case, taking possession of part was not taking possession of the whole (*f*).

It is to be observed, that the Court of Exchequer seem in *Whitehead* v. *Anderson* (*g*), to state it to be law, that the purchaser may anticipate what may be called the natural end of the transitus, by taking possession of the goods, and that if he does take actual possession, it determines the vendor's rights, even if the taking of possession be a trespass as against the carrier. The cases on this point require examination. In *Holst* v. *Pownal* (*h*), in 1794, the facts as reported were as follows: The vessel with the goods on board arrived at Liverpool, which was the port of discharge, and an agent of the bankrupt buyer who was consignee went on board in order to take possession and opened some of the packages, and then the vessel was ordered off to the quarantine ground, the agent of the buyer remaining on board to keep possession. Before the quarantine ended, and therefore before the vessel could regularly be discharged, the goods were stopped in transitu; and Lord Kenyon first, and afterwards the King's Bench in banc, held that the stoppage was good. The reporter has not informed us whether the captain of the ship assented to these premature acts of ownership or not, and evidently in his opinion the sole ground of the deci [*372] sion was *that the voyage had not terminated. The accuracy of this opinion may, however, be doubted; for only six years later, in *Mills* v. *Ball* (*i*), in 1801, Lord Alvanley treats it as quite settled, "that though the right of stoppage continues until the goods "have reached their journey's end, yet if the vendee meet them "upon the road, and take them into his own possession, the "goods will then have arrived at their journey's end, with reference "to the right of stoppage in transitu." If the decision of the King's Bench is correctly given in *Espinasse*, it must be owned Lord Alvanley overrules it decidedly. If it turned on the fact of the captain of the ship not assenting, so that the possession

(*d*) *Jones* v. *Jones*, 8 M. & W. 431.

(*e*) *Dixon* v. *Yates*, 5 B. & Ad. 313.

(*f*) See also *Slubey* v. *Hayward*, 2 H. Bl. 504; *Hammond* v. *Anderson*, 1 B. & P. N. R. 69; *Bunney* v. *Pointz*, 4 B. & Ad. 568; *Tanner* v. *Scovell*, 14 M. & W. 28; 14 L. J. Ex. 321; *Bolton* v. *Lanc. & York Ry. Co.*, L. R. 1 C. P. 440; 36 L. J. Ch. 361; *Ex parte Cooper*, 11 Ch. D. 72; *Kemp* v. *Falk*, 14 Ch. D. 446; 7 App. Ca. 586.

(*g*) *Whitehead* v. *Anderson*, 9 M. & W. 518.

(*h*) *Holst* v. *Pownal*, 1 Esp. 242.

(*i*) *Mills* v. *Ball*, 2 B. & P. 457.

if taken at all was a trespass against him, the case is untouched by Lord Alvanley's opinion.

In *Wright* v. *Lawes* (*k*), in 1801, Lord Kenyon is represented by the same reporter as deciding, that where goods bought by a person resident at Norwich were delivered into his possession by the carrier at Yarmouth, on their way from London to Norwich, they were no longer in transitu. In Abbott on Shipping, 376, Lord Tenterden, after citing the case of *Holst* v. *Pownall* (*l*), remarks that the doctrine of this case is in exact conformity to the tenor of a bill of lading, by which the master always engages to deliver at the place of destination, and which therefore gives no authority to the consignee to demand them before their arrival at that place. On this Parke, B. in *James* v. *Griffin* (*m*), has remarked, that "it is "difficult to understand how a bill of lading, which is only a con-"tract between the vendee and the shipper for the carriage, can "make any difference." If it is material to inquire whether the possession taken was wrongful as against the carrier or not, the contract between the vendee and the shipowner may make a difference; if it be, as was said in *Whitehead* v. *Anderson* (*n*), *not* material, whether it was *wrongful or not, it does seem unim- [*373] portant what that contract was.

It was decided by Lord Kenyon (*o*), and in a subsequent case (*p*) by Lord Ellenborough, that where goods were in the custody of the custom house officers, who had a right to retain them and sell them for unpaid duties, they were still in transitu, although the assignees of the bankrupt vendee had petitioned the customs for them previously to any stoppage. Lord Kenyon is reported to have given as his reason, "that the bankrupt had no right to the actual pos-"session till the duties were paid." It is difficult to think that the vendee could have bettered his position as against the vendor, by breaking the king's cellars and seizing the goods without leave of the customs.

In a case in 1802 (*q*), where this point did not arise, it was urged as an illustration, and Chambre, J., expressed his opinion as follows:—"Perhaps the consignee himself may intercept the goods "in their passage, and indeed I have little doubt but that if he do "intercept them in their passage, before the consignor has exercised "his right of stoppage in transitu, and do take an actual delivery "from the carrier before the goods get to the end of their journey, "that such a delivery to him will be complete. And I will not say "but that his creditors in the case of an execution against him may "have the same right."

(*k*) *Wright* v. *Lawes*, 4 Esp. 82.
(*l*) *Holst* v. *Pownal*, 1 Esp. 242.
(*m*) *James* v. *Griffin*, 2 M. & W. 623.
(*n*) *Whitehead* v. *Anderson*, 9 M. & W. 518.
(*o*) *Northey* v. *Field*, 2 Esp. 613, in 1798.
(*p*) *Nix* v. *Olive*, Abbott on Shipping, 12th ed. 424.
(*q*) *Oppenheim* v. *Russel*, 3 B. & P. 42, in 1802, *post*, p. 378.

In the case of *Jackson* v. *Nichol* (*r*), in 1839, the goods were consigned to the vendee at London, and the vendee repeatedly demanded the goods from the ship after the vessel had arrived in the Thames, but before the customary time for delivery, and was refused; and a subsequent stoppage was held good. In delivering the judgment of the Court of Common Pleas, Tindal, C. J., observes on this point:—"It was urged on the part of the defendants, on the [*374] "authority *of the dictum of Lawrence, J., in *Bohtlingk* v. "*Inglis* (*s*), that the tortious act of a third person should not pre-"judice the rights of the parties, and consequently, that the de-"mand made by the purchaser on the 29th, and the unlawful re-"fusal to deliver, was tantamount to a delivery. But it is to be "recollected in the first place, that the observation of Lawrence, J., "was made in the case of a demand by the consignor, for the pur-"pose of revesting his property in the goods, and not in the case of "a vendee. And in the second place, that here the goods had not "actually reached the terminus of their delivery, when the demand "of the vendee took place; and although it might be conceded to "be the better opinion, that if the vendee actually receives the pos-"session of his goods on their passage to him, and before the voy-"age has completely terminated, that the delivery is complete and "the right of stoppage gone; yet no authority has been cited for "the position, and the principle seems the other way, that a mere "demand by the vendee without any delivery before the voyage has "completely terminated, deprived the consignor of his right of "stoppage."

[In *Valpy* v. *Gibson* (*t*), in 1847, goods were sent from Leeds to be shipped at Liverpool for Valparaiso, and after having been put on board, were relanded and returned to Leeds, by order of the *buyer*, in order to have them repacked. It was held that the buyer had dealt with the goods as his own, and that the transitus was thereby terminated.]

The judgment of the Exchequer in *Whitehead* v. *Anderson* (*u*), has already been cited as far as it bears on this point. It only remains to remark, that the observations of the Court in that case are of greater weight, because the point arose in that case, and was argued, though the decision of the Court turned upon another point. Such being the authorities, it seems pretty clear, that in cases in which there is no actual delivery, if the vendee require that the [*375] carrier shall hold the *goods as his agent in a new capacity, and he assent, the transitus is ended, whether it be before or after its natural termination; and if the carrier does not assent, and is under no obligation to assent, that the transitus is not ended. But, perhaps, if the position of the carrier is such that it is his duty to

(*r*) *Jackson* v. *Nichol*, 5 Bing. N. C. 508, *ante*, p. 356.
(*s*) *Bohtlingk* v. *Inglis*, 3 East, 381, *ante*, p. 352.
(*t*) *Valpy* v. *Gibson*, 4 C. B. 837, 865; 16 L. J. C. P. 241, *ante*, p. 356.
(*u*) *Whitehead* v. *Anderson*, 9 M. & W. 518, *ante*, p. 367.

obey the command of the vendee, his assent to do his duty would be implied by law, and his refusal in fact, would not prevent such an implication. And notwithstanding the expressions of the Exchequer in *Whitehead* v. *Anderson* (*x*), it is submitted that it is doubtful whether when the carrier has a right to refuse to allow the vendee to take even constructive possession, the vendee can improve his position by a tortious taking of actual possession against the will of the carrier. The law in general discountenances violence, and it would seem not consistent with its general policy, to give a man a benefit in consequence of his forcible or fraudulent wrong against a third party. The act of taking away the goods would be a very unequivocal assertion of the vendee's claim to exercise dominion over the goods if he had the right so to do, but it is very difficult to see how it could give him such a right, if he had it not already.

If this be a correct view of the principle, the question whether actual possession taken by the vendee against the assent of the carrier terminates the transitus or not, depends on the carrier's right to insist on continuing to hold them on the original consignment. And possibly an unequivocal demand of possession made upon the middleman and refused by him, may have the same effect upon the transitus that an actual taking of possession against the assent of the middleman would have had. That is, it would terminate the transitus if the refusal was so tortious as to render the middleman liable in trover, just as the actual taking of possession would terminate the transitus if it was justifiable against the middleman. In *Holst* v. *Pownal* (*y*), and *Jackson* v. *Nichol* (*z*), the *ship- [*376] owner could not reasonably be bound to deliver the cargo at the spots where the demand was made, the consignee could only insist on his fulfilling the contract of carriage already made, and if in *Holst* v. *Pownal* (*y*), the captain refused to assent to the vendee's acts of ownership, Lord Kenyon's decision was in perfect consistency with the decision in *Jackson* v. *Nichol* (*z*), and not inconsistent with his judgment in *Wright* v. *Lawes* (*a*).

[Since the last passage was written, the view expressed in it has received full confirmation in the case of *Bird* v. *Brown* (*b*), in 1850. The goods had been stopped in the hands of a carrier, although by one who had no power to exercise the right of stoppage; consequently, the carrier refused to deliver the goods to the buyer, but delivered them to the person who had stopped them. The Court held that the transitus was at an end when the consignees demanded the goods and tendered the freight, and that the wrongful refusal of the carrier did not affect the rights of the consignee.

(*x*) *Whitehead* v. *Anderson*, 9 M. & W. 518, *ante*, p. 367.
(*y*) *Holst* v. *Pownal*, 1 Esp. 242.
(*z*) *Jackson* v. *Nichol*, 5 N. C. 508.
(*a*) *Wright* v. *Lawes*, 4 Esp. 82.
(*b*) *Bird* v. *Brown*, 4 Ex. 786; 19 L. J. Ex. 154.

The case of the *London and North-Western Ry. Co.* v. *Bartlett* (*c*), in 1861, was not a case of stoppage in transitu, but is relevant to the subject of the anticipation of the termination of the transitus. The action was by the vendor against the railway company for not delivering wheat at the mill of the purchaser, after the purchaser had instructed the company to let it lie at one of their stations, and not to deliver it at the mill. Bramwell, B., said:—"The goods "are intended to reach the consignee, and provided he receives "them, it is immaterial at what place they are delivered. The con- "tract is to deliver the goods to the consignee at the place named "by the consignor, *unless* the consignee directs them to be de- "livered at a different place.

[*377] *In the *Cork Distilleries Co.* v. *The Great Southern Ry. Co.* (*d*), in the House of Lords, in 1874, the plaintiffs suffered considerable loss in consequence of the defendants having delivered several puncheons of whisky to the purchaser at one of their stations instead of at the Customs warehouse, to which they had been consigned. It was held that the defendants were not liable; the contract for delivery being made between the carrier and the consignee, the consignor being the agent for the consignee to make it, which entitled the consignee to take delivery either at the place indicated at the time of the departure of the goods, or any other place at which he afterwards preferred to receive the goods.]

But where the goods have arrived at their journey's end, the carrier is bound to deliver them on payment of his charges, and if the charges are not tendered, though the carrier is not bound to deliver the goods, it may be that his right is no longer to insist on keeping the goods as carrier, but merely to retain the possession, holding the goods subject to any orders of the vendee, not derogatory to his lien. In *Ellis* v. *Hunt* (*e*), in 1789, Buller, J., puts the case on the ground that—"The carrier would not have been liable in the "character of a carrier, for the goods had got to the end of their "destined journey, but he would have been answerable only as ware- "house-keeper." It does not appear from the case, whether this supposed alteration in his character proceeded from some agreement so to consider himself, or because he had performed his contract of carriage, and therefore was bound as a matter of law, to act in this varied character when required.

The transitus is determined when the goods come to the actual or constructive possession of one, to whom the original buyer's rights have been transferred, exactly as when they come to the possession of the original buyer himself. And it does not make any difference whether the transfer is by the contract of the buyer, as [*378] if he sells the goods before their *arrival to a third party,

(*c*) *London & N.-W. Ry. Co.* v. *Bartlett*, 7 H & N. 400; 31 L. J. Ex. 92.

(*d*) *Cork Distilleries Co.* v. *The Great Southern Ry. Co.*, L. R. 7 E. & I. App. 269.

(*e*) *Ellis* v. *Hunt*, 3 T. R. 464.

or by operation of law, as when the buyer has become bankrupt, and consequently his rights have passed to his assignees. When, therefore, there is a sub-vendee, his possession terminates the transitus, *Dixon* v. *Yates* (*f*), and so does that of the assignees of a bankrupt buyer, or their agents. At one time there seems to have been a feeling that this was hard, and that the assignees whose rights depended entirely on the bankruptcy, should not in fairness take goods solds on the credit of the bankrupt and not yet paid for, but the law was not doubted to be so settled, even by those who questioned its propriety. "On looking "into the cases," said Lord Alvanley, in *Scott* v. *Pettit* (*g*), in 1803, "I find that we are bound to "hold, that though a bankrupt has altogether ceased to be a trader, "yet that his warehouse continues open for the purpose of receiv-"ing goods, and that the assignees have a right to take possession "of everything that may come into their hands, without paying a "single farthing. * * * No doubt therefore, for the purpose of re-"ceiving goods, the assignees stand in the place of the bankrupt." It may therefore be stated, that a third party acquiring property in the goods from the original purchaser has rights as extensive as the original purchaser. But where by an agreement between the carrier and purchaser, or by act of law, something is to intervene before the carrier is to deliver the goods, beyond what would arise in an ordinary case of carriage, that is not to be considered as making the carrier an assignee of the goods from the purchaser, so as to make his possession terminate the transitus.

In *Oppenheim* v. *Russel* (*h*), in 1802, the goods were stopped by the plaintiff in the hands of the carrier. [The plaintiffs consigned goods by the defendant, a carrier, to a vendee who owed money to the defendant for the carriage of other goods. On the vendee's insolvency the plaintiff stopped the goods and tendered the defendant his charges in respect of these *goods, but the defendant [*379] refused to give them up unless he was paid the whole sum due to him from the vendee.] The case for the defence was that the stoppage was not good, at least against the carrier, because, by agreement with the consignee, the carrier had a lien on the goods for the general balance of his account against the insolvent consignee. Lord Alvanley rejected some evidence tendered to prove this defence, and on application for a new trial the Common Pleas decided that the evidence was improperly rejected, but that there should be no new trial, because, though the carrier might have a lein as against the consignee, it would not affect the vendor's right to stop the good. At Nisi Prius, Lord Ellenborough, in *Smith* v. *Goss* (*i*), in 1808, approved of this decision and extended it. There the vendor sent goods by the vendee's direction to a carrier to be forwarded,

(*f*) *Dixon* v. *Yates*, 5 B. & Ad. 346, *ante*, p. 342.
(*g*) *Scott* v. *Pettit*, 3 B. & P. 469.
(*h*) *Oppenheim* v. *Russel*, 3 B. & P. 42.
(*i*) *Smith* v *Goss*, 1 Camp. 282.

and stopped the goods in his hands. A creditor of the purchaser had, previously to the stoppage, attached the goods in the carrier's hands, by a process out of the Mayor's Court of London. Lord Ellenborough said, that the vendor's right was the elder and preferable lien, and not superseded by the attachment.

The carrier, it is obvious, was not the less an agent to forward, though he had a general lien against the consignee. The right to retain possession till he was paid the larger sum, made his possession more valuable to him, but did not alter its character in the least. He was still an agent to forward. And from the peculiar nature of a foreign attachment, it seems not to alter the character of the holder of the property. It is probable that a seizure by the sheriff, under an execution against the purchaser, would be held to terminate the transitus, for the reasons suggested by Chambre, J., in *Oppenheim* v. *Russell* (*k*).

[*380] **The right of stoppage in transitu can be exercised only when the purchaser is insolvent or has become bankrupt.*

It is very usual for a vendor to reserve to himself by the terms of the contract of sale, and of the contract which he makes with the carrier, a right to prevent or delay the delivery of the goods to the purchaser until some conditions are fulfilled. When this is the case, the solvency of the purchaser is beside the question; neither he nor his representatives can have any right to take possession until the conditions are fulfilled, or are waived by the vendor. There is a good deal of difficulty at times, in determining whether the conditions which the vendor has endeavoured to make conditions precedent to the delivery of the possession, are or are not binding on the purchaser. On this subject something has been already said (*l*). But when the conditions are binding the case is not one of stoppape in transitu, but rather a case in which the peculiar circumstances have prevented the transitus ever commencing, as the carrier, instead of being an agent to forward from the vendor to the buyer, has agreed to be an agent to keep possession for the vendor, till the conditions are fulfilled. The right of stoppage in transitu is a right to interfere and prevent the buyer from taking actual possession, which he would otherwise have a right to take, and to undo the effect of an unconditional delivery to an agent to forward. This power does not exist, except in the case of insolvency.

In *Walley* v. *Montgomery* (*m*), in 1803, the consignor's agent Montgomery, obtained possession of the goods, and refused to deliver them to the consignee, Walley, unless he would pay the price in cash. Lord Ellenborough, at the trial, thought that the consignment was, from the first, conditional, and nonsuited the plaintiff,

(*k*) *Oppenheim* v. *Russell*, 3 B. & P. 42.
(*l*) *Ante*, p. 143.
(*m*) *Walley* v. *Montgomery*, 3 East, 585, *ante*, p. 145.

but on its being shown that the consignment was not conditional, the nonsuit was set aside. Walley was not insolvent; if he had been, this would *have been a good stoppage in transitu, [*381] and he would have had no cause of action.

In the case of the 'Constantia' (n), in 1807, in which Lord Stowell had to decide on the effect of an attempted revendication under the old law of France, where the vendor had acted under a mistake as to the insolvency of the consignee, he decided that it was a nullity, inasmuch as the insolvency did not ensue: but that if the purchaser had become insolvent, it would have been good. The law of revendication, was analogous to the law of stoppage in transitu, and Lord Stowell, in his judgment, quoted the earlier editions of Abbott on Shipping, and stated the general English law of stoppage in transitu as bearing on the question. Lord Tenterden, in the later editions of his book, adopted the judgment of Lord Stowell, as an illustration of the English law. There is no doubt now of the proposition in which these two great authorities concurred, that "the mercantile law is clear and distinct that the seller has not a right to vary the consignment, except in case of insolvency." It seems, though there is no direct authority for the proposition, that the law is precisely the same in the case of a carrier by land as in that of one by sea.

There is no necessity that the seller should have been formally declared a bankrupt, if he have become insolvent (o). There must of course, in all cases be great difficulty in proving that a person, who has not stopped payment, is, in fact, not solvent, and there seems to be no case in which this has been attempted; but the text books and *dicta* of the Judges do not restrict the use of the term "insolvent," or "failed in his circumstances," to one who has stopped payment. There must, however, be great practical difficulty in establishing the actual insolvency of one who still continues to pay his way; and as the carrier obeys the stoppage in transitu at his peril if the consignee be in fact solvent, it would seem no unreasonable rule to require that, at the time *the consignee was [*382] refused the goods, he should have evidenced his insolvency by some overt act (p).

(n) *The Constantia* (*Henrickson*), 6 Rob. 321.

(o) *Biddlecombe* v. *Bond*, 4 A. & E. 337.

(p) [Sir W. M. James said that a company was insolvent when its assets and existing liabilities were such as to make it reasonably certain that the existing and probable assets would be insufficient to meet the existing liabilities. A man is insolvent, said Willes, J., when he is not in a condition to pay his debts in the ordinary course, as persons carrying on trade usually do. See *In re European Life Assurance Society*, in 1869, 9 Eq. 128; 39 L. J. Ch. 324; and *Queen* v. *Saddlers Co.*, 10 H. L. R. 426; 32 L. J. Q. B. 345; *Bayley* v. *Schofield*, 1 M. & S. 338; *Parker* v. *Gossage*, 2 C. M. & R. 617; *Doe* v. *Rees*, 4 Bing. N. C. 384; *Shaw* v. *Lucas*, 3 Dow. & Ry. 218; *In re London and Manchester Industrial Association*, 1 Ch. D. 472; 45 L. J. Ch. 170; *In re Phœnix Bessemer Steel Co.*, 4 Ch. D. 108; *Ex parte Carpenter*, Mont. & McAr. 5.]

The stoppage in transitu must, to be effectual, be on behalf of the vendor, with an intention to exercise this power, as of right and independently of the purchaser's assent.

Even if the vendor's agent take actual possession of the goods, that is not necessarily a stoppage in transitu, unless it be done with that intent. This was decided by the Kings's Bench in 1805, in *Siffkin* v. *Wray* (*q*), in which one who was maintained to be the vendor's agent, took possession of the goods by consent of the bankrupt, in trust, to sell them and apply the proceeds to take up the bills drawn against the goods. The Court held, that even if he had been the vendor's agent that was no stoppage. But a stoppage of the goods done with intent to stop them, by a right paramount to that of the buyer, is not invalidated by being with the consent and approval of the buyer, or even by being originated by him. In *Mills* v. *Ball* (*r*), in 1801, the Court of Common Pleas held, that where a purchaser wrote to the vendor to say he was insolvent, and told him where the goods were, in order that he might stop them, the consequent stoppage was not invalid.

At one time, it seems to have been supposed, that in order to make [*383] a good stoppage in transitu, there must have been *an actual taking possession of the goods by the vendor or his agent, but it is now clearly settled, that the vendor's rights are complete on giving the person who has the possession of the goods, notice of the vendor's claim to stop the goods, at a time when he can obey it, although there is neither an actual taking of possession by the person stopping the goods, or such an assent on the part of the holder as would amount to a constructive possession.

In *Mills* v. *Ball* (*r*), in 1801, the wharfinger who had the possession of the goods told the vendor's agent, who demanded them from him, that "he would not deliver them till he was certain of a safe delivery," and the Court of Common Pleas held, that after that assent, the goods as against him, were in the vendor's possession; the Court guarded themselves against being supposed to decide what might be the case when the holder gave no assent.

In *Bohtlingk* v. *Inglis* (*s*), in 1803, the Court of King's Bench decided, that a demand on behalf of the vendor on the master of the ship in which the goods were, was a stoppage as against the assignees of the buyer, who had obtained a delivery from the master.

In *Litt* v. *Cowley* (*t*), in 1816, the Court of Common Pleas went further: the goods there were delivered to Pickfords, the carriers, at Manchester, to be delivered in London. Notice was given by the vendors to Pickford's house at Manchester, to stop the goods,

(*q*) *Siffkin* v. *Wray*, 6 East, 371.
(*r*) *Mills* v. *Ball*, 2 B. & P. 457.
(*s*) *Bohtlingk* v. *Inglis*, 3 East, 381.
(*t*) *Litt* v. *Cowley*, 7 Taunt. 169.

at a time when the goods were on the road, and when, therefore, the Manchester house could not have delivered them to the vendee. They forwarded the notice to their house in London, it arrived in plenty of time, but, by some blunder, the goods were delivered. The Court held that this notice revested the vendor's rights, and that he might maintain trover against the assignees of the bankrupt purchaser, who refused to return the goods (*u*).

*In 1842, in *Whitehead* v. *Anderson* (*x*), an unsuccessful at- [*384] tempt was made to give to a notice given to the master carrier, the effect of stopping the goods in transitu, though given at a time when he could not obey it. In that case, the goods were at sea consigned to Fleetwood, in Lancashire, when notice was given to the ship-owner, then resident at Montrose, to stop the goods. He endeavoured to do so, but the assignees of the bankrupt won the race, and reached the vessel first; it was contended, on the authority of *Litt* v. *Cowley* (*y*), that the notice given to the principal was a sufficient stoppage. The judgment of the Court on this point was as follows: —"We think it was not: but to make a notice effective as a stop- "page in transitu, it must be given to the person who has the im- "mediate custody of the goods; or if given to the principal, whose "servant has the custody, it must be given as it was in the case of "*Litt* v. *Cowley* (*y*), at such a time, and under such circumstances, "that the principal, by the exercise of reasonable diligence, may "communicate it to his servant in time to prevent the delivery to "the consignee; and to hold that a notice to the principal at a dis- "tance is sufficient to revest the property in the unpaid vendor, and "render the principal liable in trover, for a subsequent delivery by "his servants to the vendee, when it was impossible from the dis- "tance and want of means of communication, to prevent that de- "livery, would be the height of injustice. The only duty that can "be imposed on the absent principal, is to use reasonable diligence "to prevent the delivery; and in the present case such diligence "was used" (*z*).

**The unpaid vendor's right to stop in transitu may be de- [*385] feated before the termination of the transitus, by the assignment of the bill of lading to one, who bonâ fide gives value for a property in the goods shipped under it.*

The enactments commonly called the Factors' Acts, 4 Geo. 4, c. 83, 6 Geo. 4, c. 94, 5 & 6 Vict. c. 39, 40 & 41 Vict. c. 39, and the Bills of Lading Act of 1855, 18 & 19 Vict. c. 3, have considerably enlarged and altered the powers conferred on the holders of bills of lading, delivery orders, and what may be called documents of

(*u*) See *Kemp* v. *Falk*, *post*, p. 407; 14 Ch. D. 446; 7 Ap. Ca. 585.
(*x*) *Whitehead* v. *Anderson*, 9 M. & W. 518.
(*y*) *Litt* v. *Cowley*, 7 Taunt. 169.
(*z*) See also *ante*, p. 362.

title to goods, but it seems those enactments are not applicable to the case of one who is in the possession of the documents in the capacity of purchaser, and do not affect the vendor's rights at all (a). Some remarks upon this subject will be found at the end of this chapter; for the present it will be assumed, that the statutes make no difference, and the inquiry will be as to the effect of those documents at common law.

"Much confusion," said Lord Ellenborough, in *Waring* v. *Cox* (b), "has arisen from similitudinary reasoning on the subject." This curious phrase seems exactly to express the fact. Bills of lading have been likened to bills of exchange, and delivery orders and dock warrants have been likened to bills of lading, and the law applicable to any one class of these documents, has been supposed to extend by analogy to the others, which is the case only where the distinctions between these different kinds of documents are not material; and the effect of assignment of an interest in the goods, which may accompany the assignment of the bill of lading, has not always been distinguished from the effect of the assignment of the bill of lading itself.

First, it is to be observed, the purchaser who has not obtained possession of the goods, may, as soon as the bargain and sale is com- [*386] plete, transfer his rights in the goods, whether *there exists a bill of lading or not. But when no document of title exists, he can transfer no right greater than that which belongs to himself. As has been already shown, the purchaser has, from the moment the bargain and sale is complete, the general right of property, subject to the vendor's rights, and he may exercise every right of property consistent with the vendor's rights. He may sell the goods, subject to the first vendor's rights, and if he does so, the property is transferred to the second purchaser, by the second bargain and sale, without any delivery of possession.

But though the second purchaser acquires by his bargain and sale the legal property in the goods, and every right which his immediate bargainor had in the goods, yet (if there be not an assignment of a bill of lading) he acquires no greater right; he takes the property subject to the same restrictions that his immediate vendor held it under.

In *Dixon* v. *Yates* (c), in 1833, Dixon sold goods to Collard, who accepted bills for the price, and Collard, whilst the bills were still running, sold the goods to sub-purchasers, who paid him the price, and afterwards Collard became insolvent. The King's Bench decided, that one of the sub-purchasers, Bond, who had taken possession of a part of the goods, whilst Collard was solvent, was entitled to keep that part of the goods, for he had taken possession of

(a) [The recent Act, 40 & 41 Vict. c. 39, s. 4, *post*, p. 432, has altered the law since the above passage was written.]

(b) *Waring* v. *Cox*, 1 Camp. 369.

(c) *Dixon* v. *Yates*, 5 B. & Ad. 313, *ante*, p. 342.

them whilst Collard had a right to take possession, but that none of the sub-purchasers had a right to take the goods, which at the time of the insolvency, remained undelivered, for that Collard's right to take possession was defeasible on his insolvency, and though they had bought from him, and *bonâ fide* paid him whilst he was solvent, yet they did not thereby acquire any right more extensive than his, that is to say, a right defeasible on his insolvency before he acquired possession.

In *Craven* v. *Ryder* (*d*), in 1816, it was decided, by the Common Pleas, that the vendor's rights were not destroyed *by a [*387] subsale and payment, but there the defendant (who was the ship-owner and who had given a receipt for the goods to the plaintiff) was acting contrary to his own written acknowledment, and it may, perhaps, be thought that circumstance was the ground of the decision.

In *Nix* v. *Olive* (*e*), in 1805, the vendors, Abbot and Co., had sent the purchaser Fox, an unindorsed bill of lading. The goods arrived, and Fox sold them to Nix, the plaintiff, who did not obtain possession. Fox became insolvent, and the defendants, who were agents of Abbott and Co., sold the wine. Nix brought trover, and Lord Ellenborough decided, that Abbott and Co., still had the right to stop in transitu. It is to be observed, that there did, in that case, exist an unindorsed bill of lading, but that could not prevent the property being transferred from Fox to Nix by the subsale: see *Nathan* v. *Giles* (*f*).

In *Akerman* v. *Humphrey* (*g*), in 1823, the Common Pleas decided that a sale by the purchaser, accompanied by a delivery of the shipping note, did not put an end to the vendor's rights to stop in transitu.

These authorities are sufficient to overrule what seems to have been the opinion of Buller, J., expressed in his celebrated argument in *Lickbarrow* v. *Mason* (*h*), in 1793, in the House of Lords, in which he contends that:—"goods can never be stopped in transitu after "they have been sold and paid for, or money advanced upon them "*bonâ fide*, and without notice;" indeed, that opinion seems to have been overruled in that case, and has never since been acted upon. It may therefore be asserted, that a mere re-sale by the purchaser does not divest the vendor's rights when there is no assignment of a bill of lading. And a pledge of the goods cannot have more effect than a sale of them, even if a pledge of goods unaccompanied by something equivalent to a *delivery of possession, passes [*388] any legal property in them, which is somewhat doubtful (*i*).

(*d*) *Craven* v. *Ryder*, 6 Taunt. 433.
(*e*) *Nix* v. *Olive*, Abbott on Shipping, 12th ed., 424.
(*f*) *Nathan* v. *Giles*, 5 Taunt. 558.
(*g*) *Akerman* v. *Humphrey*, cited 4 Bing. 522.
(*h*) *Lickbarrow* v. *Mason*, 6 East, 21, n. 34.
(*i*) But see the judgment of Willes, J., in ***Meyerstein* v. *Barber***, L. R. 2 C. P. 52; 36 L. J. C. P. 57.

It is clear, also, that the purchaser, if he has the right of possession, may give a third person authority to take possession of the goods without conferring on him any right of property whatever in them. If the carrier, or other holder of the goods, delivers them to such a person, it is a delivery to the purchaser whose agent that person is, and such a delivery is for every purpose the same as a delivery to the purchaser himself. If the carrier refuses to deliver the goods to the agent, it is in general the same thing (if there be due notice of the authority) as if he had refused to deliver them to the purchaser himself, and if the refusal be not justifiable, the purchaser has the same remedy as if the refusal had been to him in person. But the agent has no right of action for such a refusal. He has no right of property or possession in the goods, and can maintain no action in his own name for any wrong done to the right of possession or property of his principal, the purchaser. In this respect, one who has merely got authority to receive the goods, differs from a sub-purchaser; for the sub-purchaser having himself acquired the legal rights of property and possession, such as they belonged to his immediate vendor, *i. e.*, vested though defeasible, may maintain in his own name an action for anything done in contravention of those rights after he has acquired them.

Such being the power of the purchaser over the goods before he has taken possession, when there are no documents of title to the goods, the question arises, what difference does the existence of such documents make?

A bill of lading is a writing signed on behalf of the owner of the ship in which goods are embarked, acknowledging the receipt of the goods, and undertaking to deliver them at the end of the voyage (subject to such conditions as may be mentioned in the bill of [*389] lading). The bill of lading is sometimes *an undertaking to deliver the goods to the shipper by name, or his assigns, some times to order or assigns, not naming any person, which is apparently the same thing (*k*), and sometimes to a consignee by name, or assigns, but in all its usual forms it contains the word assigns.

The bill of lading is, therefore, a written contract, between those who are expressed to be parties to it, on behalf of their principals if they be agents, that is, generally speaking, between the master of the ship, on behalf of his principals the shipowners, on the one part, and the person named as shipper of the goods on the behalf of the person who, at the time of shipment, was his principal, on the other part, by which it is agreed that the shipowner is to deliver the goods to the person who shall fill the character of assign.

The assignment of the bill of lading designates that person, and the master, by delivering the goods to him, fulfils the contract, and by refusing to deliver them to him, he breaks the contract; but [prior to the Bills of Lading Act of 1855 (*l*)] the assign of the bill

(*k*) Abbott on Shipping, 12th ed., 258.
(*l*) 18 & 19 Vict. c. 3, s. 1.

of lading was not made a party to the contract with the master, nor could he, as assign, maintain in his own name, any action on the contract contained in the bill of lading. In this respect, the assignment of a bill of lading differed greatly from that of a bill of exchange, for the indorsee of a bill of exchange is by the law merchant entitled to sue the previous parties to the bill in his own name, and is by the indorsement rendered a party to the contract, though not one originally; but the contract contained in a bill of lading is a chose in action, and there was no means whatsoever by which any person could be rendered a party to the contract contained in a bill of lading, who was not a party to it from its first inception. Even if the assign of a bill of lading had acquired the full legal and equitable property in the goods, so that the damage arising from the non-delivery was exclusively his, still he was compelled to bring any action on the contract in the name of the *ori- [*390] ginal contractor as his trustee; for in general, contracts do not by the law of England run with goods, and no custom has ever been recognised making the contract contained in a bill of lading an exception (*m*).

[The law on this point has been altered by that Act (*n*), and now "Every consignee of goods named in a bill of lading, and every "indorsee of a bill of lading to whom the property in the goods "therein mentioned shall pass, upon or by reason of such consign- "ment or indorsement, shall have transferred to and vested in him "all rights of suit, and be subject to the same liabilities in respect "of such goods, as if the contract contained in the bill of lading "had been made with himself."]

If, however the goods when shipped are not the property of the shipper, he in general acts in shipping them as agent for the owner of the goods. When he does so, the principal is from the first a party to the contract, though made in the name of his agent, and may maintain an action upon it in his own name as well as in that of the agent. And his right to maintain such an action is not affected by his being named in the bill of lading as consignee, or by his subsequently becoming indorsee of the bill.

Anderson v. *Clarke* (*o*), in 1824, was an action by Anderson on the contract in a bill of lading against the master for not deliver-

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(*m*) *Sargent* v. *Morris*, 3 B. & A. 277, in 1820; *Thompson* v. *Dominy*, 14 M. & W. 403, in 1845; 15 L. J. Ex. 320; *Howard* v. *Shepherd*, 9 C. B. 297; 19 L. J. C. P. 249.

(*n*) 18 & 19 Vict. c. 3, s. 1. [In *Short* v. *Simpson*, in 1866, 1 C. P. 248; 35 L. J. C. P. 147; the consignor indorsed the bill of lading as security for an advance. On repaying the advance it was reindorsed to him, and it was held that he was thereby remitted to all his rights under the original contract. For the indorsee's liability for freight, see *Burdick* v. *Sewell*, 10 Q. B. D. 363, and 13 Q. B. D. 159; 10 Ap. Ca. 74; 52 L. J. Q. B. 428; 53 L. J. Q. B. 399; where the effect of the indorsement of a bill of lading by way of a pledge as distinguished from a sale was much considered.]

(*o*) *Anderson* v. *Clarke*, 2 Bing. 20.

ing goods. The goods were shipped by Orr at Newry; Orr transmitted the bill of lading to Anderson. The form of the bill of lading is not given in the report, but it seems to have stated that [*391] the goods were shipped by Orr, deliverable *to Anderson or assigns. The Court decided, after examining the correspondence, that there was an express appropriation of the goods to Anderson at the time of shipment, so that Anderson had a special property in them the instant they were put on board (*p*). The objection was then taken, that though Anderson might maintain trover, he was no party to the contract, but the Common Pleas said that there was no weight in the objection, as they considered that Orr, in shipping the goods, acted as agent for Anderson (*q*).

But though it seems perfectly well ascertained that the assignment of a bill of lading does not [apart from the statute (*r*)] transfer the contract, and has no other effect on the contract than that of appointing the person who is to receive the possession of the goods under it, the effect of the assignment of the bill of lading upon the property in the goods is a different matter. There was at one time an extreme difference of judicial opinion upon the subject, but the authorities now seem to establish that the mere assignment of the bill of lading does not confer on the assign any legal right either of property or possession in the goods. It confers upon him an authority to receive the goods, and that authority may, as a matter of evidence, go very far to show that the person who has got it has also acquired a right of property and possession in the goods; but unless there be such a bargain as would, independently of the assignment of the bill of lading, give an interest in the goods, the assignee of the bill acquires no interest in the goods, and consequently cannot maintain any action in his own name for any injury done to them. When, however, the bill of lading is assigned in *bonâ fide* furtherance of a contract conferring an interest in the goods for a valuable consideration, it has (at least so far as regards the question of stoppage in transitu) the same effect at law that an actual delivery of the goods would have had. [The transfer of a [*392] bill of lading has the same effect in *defeating the unpaid vendor's right to stop in transitu as the actual delivery of the goods themselves under the same circumstances (*s*). The indorsement by a mere holder, or a finder, or a thief, would transfer no interest.]

The law upon the subject must chiefly be taken from the authorities subsequent to the great case of *Lickbarrow* v. *Mason* (*t*), which

(*p*) See *per* Parke, B., in *Bryans* v. *Nix*, 4 M. & W. 788, 792.

(*q*) See Smith's Law of Contracts, Lecture X., for the adoption by the principal of the agent's contract.

(*r*) *Ante*, p. 389.

(*s*) *Per* Blackburn, J., in *Cole* v. *North-Western Bank*, in 1875, 10 C. P. 363; 44 L. J. C. P. 237. See also *Gurney* v. *Behrand*, 3 E. & B. 634; 23 L. J. Q. B. 265.

commenced in 1787, and which was settled in 1794, for though that case can scarcely be considered as decided at all, the elaborate arguments on both sides by all the Judges make it the origin of the law.

The cases before it, on the subject of bills of lading, were but few. In *Lickbarrow* v. *Mason* (*t*), Mr. Justice Buller entertained a very strong opinion that the transfer of a bill of lading operated as a transfer of an absolute legal property in the goods, [but the law now is that the assignment of a bill of lading, either by way of sale or pledge, in furtherance of a bargan to transfer an interest in the goods, by one who has an interest in them, or authority to act for one who has (and this authority may be express or obtained under the Factors Acts), for valuable consideration, and *bonâ fide* without notice to the party taking it, of a better title, destroys the unpaid vendor's right, to the extent of that interest, to stop the goods in transitu as effectually as if the goods had been actually delivered.]

In *Caldwell* v. *Ball* (*u*), in 1786, sugar was shipped in Jamaica by Thompson. The defendant, who was master of the ship, signed, as usual, three bills of lading. The first signed was to deliver the goods to Fairbrother, or his assigns, the other two were to deliver the goods to order or assigns. *The first bill of lading was sent [*393] by Thompson, who was the owner of the goods, to Fairbrother, who was his London correspondent. Then Thompson pledged the goods in Jamaica to France and Co., and indorsed the bills of lading to them. Fairbrother, in London, afterwards indorsed the bill of lading in his possession to the plaintiffs, who besides having some ground for claiming an equitable lien on the goods, on account of former transactions, had also made advances on the bill of lading. The defendant delivered the goods to the representative of the Jamaica pledgee. The plaintiffs brought trover against him, and the defendants had a verdict, which the King's Bench refused to disturb. Buller, J., said:—"The second objection was, that as there "were different bills of lading, the defendant was bound to deliver "the cargo according to the first bill of lading actually signed. "Now, as to this, the principle point, it is material to consider the "nature of a bill of lading. It is an acknowledgement under the "hand of the captain, that he has received such goods, which he "undertakes to deliver to the person named in that bill of lading. "It is assignable in its nature; and by indorsement the property is "vested in the assignee. It is now clearly settled that goods at sea "may be so assigned. This doctrince is laid down in *Evans* v.

(*t*) [*Lickbarrow* v. *Mason*, this case was firstly tried in the King's Bench in 1787, 2 T. R. 63. It was then reversed in the Exchequer Chamber in 1790, 1 H. Bl. 357. And the judgment of the Exchequer Chamber was reversed in the House of Lords in 1793, 6 East, 21, and a *venire de novo* awarded, *post*, p. 397. And the new trial in 1794 is reported in 5 T. R. 683. A writ of error was again brought, but subsequently abandonod.]

(*u*) *Caldwell* v. *Ball*, 1 T. R. 205.

"*Martlet* (*x*), and is recognised by Lord Mansfield in *Wright* v. "*Campbell* (*y*). It is argued that the captain must be answerable "at all events in this action, because he signed the first bill of lad-"ing to the order of Fairbrother, who indorsed it to the plaintiffs. "I think it very material to consider who Fairbrother was. He had "no interest in these goods, and he was known to all the parties to "be the agent of Thompson. Then Fairbrother must be consid-"ered as Thompson himself. * * * As, therefore, this trans-"action is to be considered in the same light as if all the bills of "lading had been made to the order of Thompson, how does the [*394] "question stand as between the plaintiffs and *France and "Co. Both parties claim under Thompson, but France and Co. "have the first legal right, for two bills of lading were first in-"dorsed to them, and the letter which conveyed the other bill of "lading to Fairbrother, apprised him at the same time of this in-"dorsement."

In *Hibbert* v. *Carter* (*z*), in 1787, the plaintiff brought an action on a policy of insurance on goods shipped by him.

In the course of the trial, it appeared that previously to the making of the policy, the plaintiff had indorsed the bill of lading to a creditor, but it was not in evidence under what circumstances the indorsement was made. Buller, J., ruled that the indorsement of the bill of lading *primâ facie* transferred the whole property, and therefore, that on this evidence the plaintiff had no insurable interest. The King's Bench confirmed this ruling, but granted a new trial on affidavits, explaining the indorsement, and showing that it was only by way of pledge.

In the next term after this last decision, in 1787, the case of *Lickbarrow* v. *Mason* (*a*) first came before the Court. In that case, Turing and Son shipped the goods by the order and on account of Freeman. The master of the ship signed four bills of lading to order or assigns. Turing indorsed two of the bills in blank and sent them to Freeman, and shortly afterwards drew on Freeman for the price, and he accepted the drafts. Freeman sent the bills of lading to Lickbarrow, who made him advances on the faith of them. Then freeman failed, and his acceptances were dishonoured. Mason, as Turing's agent, succeeded in stopping the goods, and Lickbarrow brought trover against him for so doing. These facts were put upon the record in the shape of a demurrer to the evidence. The King's Bench, consisting of Ashurst, J., Buller, J., and Grose, J., gave judgment in Trinity Term, 1787, for the plaintiff. Buller, J., put his judgment on the same ground on which he seems to have acted in *Caldwell* v. *Ball* (*b*), and *Hibbert* v. *Carter* (*z*). He

(*x*) *Evans* v. *Martlet*, 1 Lord Ray. 271.
(*y*) *Wright* v. *Campbell*, 4 Burr. 2051.
(*z*) *Hibbert* v. *Carter*, 1 T. R. 745.
(*a*) *Lickbarrow* v. *Mason*, 2 T. R. 63, in the King's Bench.
(*b*) *Caldwell* v. *Ball*, 1 T. R. 216, *ante*, p. 392.

said:—"I make the *question even more general than was [*395] "made at the Bar, namely,—whether a bill of lading is by law a "transfer of the property. * * * It has been said that no case has "yet decided that a bill of lading does transfer the property, but in "answer to that, it is to be observed that all the cases upon the "subject, *Evans* v. *Martlet* (c), *Wright* v. *Campbell* (d), and *Cald-"well* v. *Ball* (e), and the universal understanding of mankind pre-"clude the question." Neither Ashurst, J., nor Grose, J., express their concurrence in this doctrine. They both put their judgment on the ground, that by giving Freeman an indorsed bill of lading, Turing clothed him with apparent authority to sell the goods. "In "this case," said Ashurst, J., "the goods were transferred by the "authority of the vendor, because he gave the vendee a power to "transfer them; and being sold by his authority, the property is "altered." And Grose, J., said:—"A bill of lading carries credit "with it; the consignor by his indorsement gives credit to the bill "of lading, and on the faith of that, money is advanced."

The defendant brought a writ of error (*f*), and the Court of Exchequer Chamber, in 1790, reversed this judgment. Lord Loughborough delivered their unanimous judgment. He expressly and pointedly overrules Mr. J. Buller's doctrine, that the indorsement of a bill of lading of itself transfers the property in the goods. He said, "The general property remains with the shipper of the goods, "until he had disposed of it, by some act sufficient in law to trans-"fer property. The indorsement of the bill of lading, is simply a "direction of the delivery of the goods: when this indorsement "is in blank, the holder of the bill of lading may receive the goods, "and his receipt will discharge the shipmaster; but the holder of "the bill, if it came into his hands casually, without any just title, "can acquire no property in the goods. A special indorsement de-"fines the *person appointed to receive the goods, his re- [*396] "ceipt or order would, I conceive, be a sufficient discharge to the "shipmaster, and in this respect, I hold the bill to be assignable. "But what is it that the indorsement of the bill of lading assigns "to the holder, or the indorsee? A right to receive the goods, and "to discharge the shipmaster as having performed his undertak-"ing. * * * Bills of lading differ essentially from bills of "exchange in another respect. Bills of exchange can only be used "for the one given purpose, namely, to extend credit by a speedy "transfer of the debt which one person owes to another, to a third "person. Bills of lading may be assigned for as many different "purposes as goods may be delivered. They may be indorsed by "the true owner of the goods, by the freighter who acts merely as "his servant: they may be indorsed to a factor to sell for the owner;

(c) *Evans* v. *Martlet*, 1 Lord Ray. 271.
(d) *Wright* v. *Campbell*, 4 Burr. 2051.
(e) *Caldwell* v. *Ball*, 1 T. R. 216, *ante*, p. 302.
(f) *Mason* v. *Lickbarrow*, 1 H. Bl. 357.

"they may be indorsed by the seller of the goods to the buyer; they "are not drawn in any certain form; they sometimes do, and some-"times do not, express on whose account and risk the goods are "shipped; they often, especially in time of war, express a false ac-"count and risk; they seldom, if ever, bear upon the face of them "any indication of the purpose of the indorsement. To such an "instrument, so various in its use, it seems impossible to apply the "same rules as govern the indorsement of bills of exchange. The "silence of all authors treating of commercial law, is a strong ar-"gument that no general usage has made them negotiable as bills "of exchange. * * * The conclusions which follow from this "reasoning, if it be just, are—1st. That an order to direct the de-"livery of goods indorsed on a bill of lading, is not equivalent to, "or even analagous to the assignment of an order to pay money by "the indorsement of a bill of exchange. 2nd. That the negotia-"bility of bills and promissory notes, is founded on the custom of "merchants and positive law; but as there is no positive law, "neither can any custom of merchants apply to such an instru-"ment as a bill of lading. 3rd. That it is, therefore, not negotia-"ble as a bill, but assignable, and passes such right, and no better, [*397] "as the *person assigning had in it. This last proposition "I confirm by the consideration, that actual delivery of the goods, "does not itself transfer an absolute ownership in them, without a "title of property, and that the indorsement of the bill of lading, "as it cannot in any case transfer more right than the actual de-"livery, cannot in every case pass the property, and I therefore "infer, that the mere indorsement can in no case convey an absolute "property. It may, however, be said, that admitting an indorse-"ment of a bill of lading does not in all cases import a transfer of "the property of the goods consigned, yet where the goods, when "delivered, would belong to the indorsee of the bill, and the in-"dorsement accompanies a title of property, it ought in law to "bind the consignor, at least with respect to the interest of third "parties; this argument has, I confess, a very specious appearance." He combats it, however, at great length, and with much ability and learning, and concludes by giving judgment for the plaintiff in error, who was the defendant below.

This judgment was taken by a writ of error to the House of Lords (*g*), and in 1793 the opinions of the Judges were taken. Six of them, Eyre, C.J., Gould, J., Heath, J., Hotham, J., Perryn, B., and Thomson, B., delivered their opinions for affirming the judgment of the Exchequer Chamber; three of them, Ashurst, J., Grose, J., and Buller, J., were for reversing it. The only one of those opinions which have been preserved is that of Buller, J. (*h*): he maintains that the indorsement of a bill of lading does of itself transfer the

(*g*) *Lickbarrow* v. *Mason*, 6 East, 21.
(*h*) 6 East, 21, n.

legal property, and further that the right of stoppage in transitu does not exist, except between the vendor and the original vendee. From some expressions of Eyre, C.J., in a subsequent case, in 1796, it may be collected what his opinion was. "And here," said he in *Haille* v. *Smith* (*i*), "the bill of lading operates as in my "poor judgment it ought to *operate; it operates as evi- [*398] "dence of a change of property, and as such I have no difficulty "and never had in giving it its full effect. Ninety-nine times in an "hundred the indorsement of a bill of lading will be conclusive evi- "dence of the alteration of property, without ascribing to it the "effect of a legal instrument, as a bill of sale. Cases may arise in "which it will be difficult to understand that such was the meaning "of the parties." What the opinions of the other five Judges in *Lickbarrow* v. *Mason* (*k*) were grounded upon must be collected from the course of subsequent decisions, or remain in doubt. The House of Lords ordered a *venire de novo*, as they were of opinion that the facts did not sufficiently appear on the record. The jury on the new trial (*k*), under the direction of Lord Kenyon, found a special verdict, in which in addition to the facts before stated, they found that by the custom of merchants bills of lading are negotiable and transferrable, and that by such negotiation the property in the goods is transferred. The King's Bench (*l*), in 1794, without argument gave judgment for the plaintiff, in order that the case might be taken to the House of Lords, but the defendant submitted and did not take the case into error.

As far as the opinions of the Judges can be ascertained (*m*) they were eight to four in favour of the defendant; but it is probable that the finding of the jury of the custom of merchants had great weight; at all events, it has always since *Lickbarrow* v. *Mason* (*k*) been considered as settled law that a *bonâ fide* purchaser of an interest in goods by taking an assignment of a bill of lading in furtherance of that purchase, renders his interest indefeasible by the consignor's stoppage in transitu. But the decisions subsequent to *Lickbarrow* v. *Mason* (*n*), show that the holder of a bill of lading, if he has no interest in the goods, nor authority from the real owner to *sell an interest in them, cannot (in cases to which the [*399] Factor's Acts do not apply), give to his indorsee any title in the goods, although the indorsee has *bonâ fide* given value for the indorsement of the bill of lading. In this respect, a bill of lading is unlike a bill of exchange, and can scarcely be properly called negotiable at all. And the weight of the authorities is also, that an indorsement of a bill of lading does not by itself *primâ facie* confer

(*i*) *Haille* v. *Smith*, 1 B. & P. 570.
(*k*) *Lickbarrow* v. *Mason*, 5 T. R. 683.
(*l*) 5 T. R. 683.
(*m*) Six to three in the House of Lords, and Lord Loughborough and Wilson, J., who concurred in the judgment of the Exchequer Chamber, against Lord Kenyon, who was a party to the second judgment of the King's Bench.
(*n*) *Lickbarrow* v. *Mason*, *ante*, p. 395.

any legal right of possession on the indorsee, or anything more than an authority to receive; though an indorsement of the bill of lading in furtherance of such a bargain as of itself confers an interest in the goods, does on behalf of a *bonâ fide* indorsee, operate as an actual delivery of the possession would have done, and so renders that interest indefeasible by the original vendor's stoppage in transitu. To that extent the bill of lading is negotiable, but the mere indorsement of the bill of lading, not in furtherance of a bargain, is not equivalent to a delivery of possession, even as against a wrong doer. If this be a correct view of the subsequent authorities, they show that most of the positions for which Mr. J. Buller contended, in *Lickbarrow* v. *Mason* (*o*), were overruled in that case; and it is very important that this should be clearly stated, for the very great ability of his opinion, and the prominent way in which it is reported, makes it frequently be taken as the judgment of the House of Lords in *Lickbarrow* v. *Mason* (*o*).

Coxe v. *Harden* (*p*), in 1803, is the first reported case on the subject, after the final decision of *Lickbarrow* v. *Mason* (*o*). [In this case a mere indorsee brought trover in his own name.] There the unpaid vendors, Browne and Co., indorsed the bill of lading to Coxe their agent, for the purpose of stopping the goods in transitu. Coxe brought trover in his own name, against a purchaser of the goods who had obtained possession. The King's Bench decided the case on the ground that the transitus had terminated, but they expressed a strong opinion, that even if it had not, Coxe could not [*400] maintain trover in his *own name. Lord Ellenborough said, "No decision of a Court of law has ever gone further than to say, "that the assignment of a bill of lading by the consignees for a "valuable consideration, and without notice by the party taking it "of a better title, passes the property in the goods thereby con-"signed. But no consideration having been paid by the plaintiff "in this case for such assignment, he took the bill of lading merely "as agent for Browne and Co., and without any property in himself "in the goods. The analogy between bills of lading and bills of "exchange, has been pushed in the argument beyond all warrant of "authority; but I agree to the extent of the doctrine in the case of "*Lickbarrow* v. *Mason* (*o*), that an indorsement of a bill of lading "for a valuable consideration, and without notice by the indorsee "of a better title, passes the property."

In *Newsom* v. *Thornton* (*q*), in 1805, the facts were that the plaintiffs consigned some beef to Church, as their factor, and sent him an indorsed bill of lading; he pledged the bill of lading with the defendants (who had no notice that Church was only a factor), and soon after became bankrupt. The pledgees obtained the goods,

(*o*) *Lickbarrow* v. *Mason*, *ante*, p. 395.
(*p*) *Coxe* v. *Harden*, 4 East, 211.
(*q*) *Newsom* v. *Thornton*, 6 East, 17.

and the plaintiffs recovered a verdict in trover against them. The defendant's counsel argued before the King's Bench, that the indorsement of a bill of lading for a valuable consideration, and without notice, conveys *per se* the legal property in the goods to the indorsee. The King's Bench refused to disturb the verdict. Lord Ellenborough said, "I should be sorry if anything fell from the "Court which weakened the authority of *Lickbarrow* v. *Mason* "(*r*), as to the right of a vendee to pass the property of goods in "transitu by indorsement of the bill of lading to a *bonâ fide* holder "for a valuable consideration, and without notice. * * * This "was a direct pledge of the bill of lading, and not intended by "the parties as a sale. A bill of lading, indeed, shall pass the "property upon a *bonâ fide* indorsement and delivery, where it is "intended so to operate, in the *same manner a sa direct deliv- [*401] "ery of the goods themselves would do if so intended, but it can- "not operate further. * * * I consider the indorsement of a bill of "lading, apart from all fraud, as giving the indorsee an irrevocable "uncountermandable right to receive the goods, that is, where it is "meant to be dealt with as an assignment of the property in the "goods, but not where it is only meant as a deposit by one who had "no authority to do so." Lawrence, J., said, "In the case of *Lick-* "*barrow* v. *Mason* (*r*), some of the Judges did indeed liken a bill "of lading to a bill of exchange, and consider that the indorsement "of the one did convey the property in the goods in the same manner "as the indorsement of the other convey[illegible] sum for which it "is drawn: but when the case was before the Exchequer Chamber "there was much argument to show, that in itself the indorsement "of a bill of lading was no transfer of the property, though it "might operate as such, in the same manner as other instruments "may be evidence of the transfer of the property; as if goods be "sold by a merchant abroad to his correspondent here, and the bill "of lading be sent to him indorsed, to deliver the goods to the "vendee or his order; there the transfer of the goods may be evidenced "by such indorsement; and if the vendee part with the property in "the goods whilst they are yet in transitu, and before his property "in them is devested by the vendor's stopping them in transitu, "and which assignment of the vendee's property may be evidenced "in like manner by his indorsement to another, then, according to "*Lickbarrow* v. *Mason* (*r*), the original vendor's right to stop them "in transitu, would be devested; therefore, all that that case seems "to have decided, is, that where the property in the goods passed "to a vendee, subject only to be devested by the vendor's right to "stop them in transitu, such right must be exercised if at all, be- "fore the vendee has parted with the property to another for a valu- "able consideration, and *bonâ fide*, and by *the indorsement [*402] "of the bill of lading, given him a right to recover them."

(*r*) *Lickbarrow* v. *Mason*, see p. 395.

In the case of *Patten* v. *Thompson* (*s*), in 1816, the whole Court of King's Bench agreed, that the mere indorsement of a bill of lading by the consignee, did not devest the vendor's right to stop in transitu, unless it accompanied a bargain to give an interesr in the goods, but they differed a little as to what was a sufficient agreement to give an interest. In that case, the plaintiff's sold to a Dublin house, a cargo of goods shipped for Liverpool, sent them the bills of lading, and drew upon them for the price. The Dublin house had extensive transactions with a Liverpool house, they drew several drafts on the Liverpool house about this time, and wrote them a letter, in which they mentioned their having done so, and also inclosed them the indorsed bill of lading of the goods sold them by the plaintiffs, and requested the Liverpool house to insure them on behalf of the Dublin house; but there was nothing in the letters showing any intention to appropriate the bill of lading, specifically as a security for any of the drafts. The Liverpool house made the insurance, and accepted the drafts. Before the ship arrived at Liverpool, the Dublin and Liverpool houses both failed, the plaintiff stopped the goods in transitu, and then the assignees of the Liverpool house seized and sold them. The plaintiffs brought trover against them for so doing. It appeared that the Liverpool house were factors for the Dublin house, and that at the time of the failure, the balance of the account was in favour of Liverpool, but in consequence of the dishonour of many acceptances for which they had credit, the balance before the trial turned the other way. Lord Ellenborough thought, that the fact showed that the bills of lading were indorsed to the Liverpool house, as factors, but without any agreement to give them a security on these goods, either for the specific drafts, or for their general balance. If the goods had come to the hands of the factors, they would have had a lien, but there was no bargain that they should come to their [*403] *hands, and he held, that the assignment of the bill of lading, under such circumstances, did not devest the vendor's rights. Abbott, J., expressed great doubts as to whether the transaction did not amount to a pledge of the bill of lading, but he thought that the bankruptcy of the pledgees, and the dishonour of the acceptances, put an end to the pledge. In either point of view, the case is a distinct authority, that the indorsement of a bill of lading is not equivalent to a delivery of possession, for if the goods had been delivered to the Liverpool house, at the time the bill of lading came to their hands, the plaintiff's case would have been at an end.

Against those authorities is to be set the case of *Morison* v. *Gray* (*t*), in 1824, in which the Common Pleas decided that an indorsement of a bill of lading made by the vendor to his agent, without any value, and for the sole purpose of enabling him to stop in tran-

(*s*) *Patten* v. *Thompson*, 5 M. & S. 350.
(*t*) *Morison* v. *Gray*, 2 Bing. 260.

situ, conferred on the agent a special property sufficient to enable him to maintain trover in his own name. This decision is contrary to the opinion of the King's Bench in *Coxe* v. *Harden* (*u*), and also to the strongly expressed dicta of Lord Ellenborough in *Waring* v. *Coxe* (*x*), in 1808, in which the plaintiff's counsel argued that the indorsee must be taken to have the legal property of the goods. Lord Ellenborough said, "I am decidedly of opinion, "that without value he has not. No case has gone so far as to de-"cide that a bill of lading is transferable like a bill of exchange, "and that the mere signature of the person entitled to the delivery "of the goods *primâ facie* passes the property in them to the in-"dorsee. Much confusion has arisen from similitudinary reasoning "upon this subject. There must be value upon the indorsement of "a bill of lading, or no property in the goods is thereby transferred. "The right to stop the goods in transitu is a personal right of the "seller, and cannot be thus assigned to another. In this case the "action, if maintainable at all, should have been brought, not in the *"name of the agent, but the consignor himself." This [*404] opinion was not necessary to decide the case of *Waring* v. *Coxe* (*x*), but it is the opinion of a very great judge.

[In *Gurney* v. *Behrend* (*y*), in 1854, Behrend and Co. of Dantzic contracted to sell a cargo of wheat to Werthemann, who turned out to be the agent of one Priess. Behrend and Co. took the bill of lading to order or assigns, indorsed it in blank, and, agreeably to Werthemann's instructions, sent it to Collmann and Stolterfoht, and drew on them for the price. Behrend and Co. sent the drafts to their agents in London, who left them with Collman and Stolterfoht for acceptance. The drafts were returned dishonoured, and Behrend and Co. took possession of the cargo when it arrived. Priess had in the meantime obtained the bill of lading from Collmann and Stolterfoht, but there was no evidence as to the way in which he had done so. He had then pledged it with a firm, who had in turn pledged it with the plaintiffs. The real question was whether Priess had obtained the bill of lading under such circumstances as to be able to confer a good title on a *bonâ fide* transferree. The Court came to the conclusion that the property in the wheat had passed to the vendee when the bill of lading was sent to Collmann and Stolterfoht, and that they had authority to part with the bill of lading before accepting the bills, and that they had handed it to Priess, who could therefore give a good title to his transferee.

In *Schuster* v. *McKellar* (*z*), in 1857, where the vendors allowed the vendees' lighterman to get possession of goods on the understanding that the lighterman, after putting the goods on board ship, would bring the mate's receipts to them (the vendors), who would

(*u*) *Coxe* v. *Harden*, 4 East, 211, *ante*, p. 146.
(*x*) *Waring* v. *Coxe*, 1 Camp. 369.
(*y*) *Gurney* v. *Behrend*, 3 E. & B. 622; 23 L. J. Q. B. 265.
(*z*) *Schuster* v. *McKellar*, 7 E. & B. 704; 26 L. J. Q. B. 281.

hold them until they received payment and then hand them to the vendees to enable them to have the bill of lading made out in their own names.

The vendees fraudulently procured the bill of lading to be signed, without paying for the goods, and indorsed it to a bank as security for an advance.

[*405] *This action was by the vendor against the shipowners for refusing to deliver up the goods. The Court sustained the verdict for the plaintiffs.

In *Pease* v. *Gloahec* (*a*), in 1866, the vendee accepted a bill for the goods and had the bill of lading indorsed and delivered to him, and afterwards, in consequence of a conversation, delivered it back to the vendor's agent. Two days after that he obtained possession of it again by a false representation and indorsed it to his bankers, to whom he was indebted. He became insolvent, and the vendors stopped the goods in transitu, and the Court held that the vendor's rights to stop the goods as against the bankers was gone.

The property was in the vendee before, and at the time when he fraudulently obtained possession of the bill of lading. He acquired nothing by the fraud but the means of disposing of that which was already his own. It was not therefore a case in which a vendee sought to give a greater title to goods than he himself possessed, as in *Cundy* v. *Lindsay* (*b*).

In *Coventry* v. *Gladstone* (*c*), in 1867, Gillander and Co. consigned linseed from Calcutta to London, sending an invoice to Waite, the purchaser, and a bill of lading together with a draft on Waite to Gladstone and Co, the defendants. On the receipt of the invoice, Waite called on the defendants at their office, and there met one of the defendants' clerks, who gave Waite the bill of exchange drawn against the linseed for his acceptance, and by mistake handed him the bill of lading indorsed by Gillander and Co. in blank which was pinned to the draft. Waite accepted the draft, took away the bill of lading and pledged it with the plaintiffs. The defendants contended that Waite had obtained the bill of lading by a mistake and without any authority from them or intention on their part to give him possession, and relied on the *dictum* of Campbell, C.J., in *Gurney* v. *Behrend* (*d*), but Sir W. Page [*406] Wood, V.-C., gave *judgment for the plaintiffs, holding that the defendants had full authority to deliver the bill of lading to Waite, and that it was in the hands of their servants for that purpose.

It is somewhat difficult to reconcile this case with Lord Campbell's *dictum*, for although the defendants had authority to part with the bill of lading they do not appear to have exercised it.

(*a*) *Pease* v. *Gloahec*, L. R. 1 P. C. 219; 35 L. J. P. C. 66.
(*b*) *Cundy* v. *Lindsay*, 3 Ap. Ca. 459; 47 L. J. Q. B. 481, *ante*, p. 168.
(*c*) *Coventry* v. *Gladstone*, L. R. 4 Eq. 493; 37 L. J. Ch. 30.
(*d*) *Gurney* v. *Behrend*, 3 E. & B. 634; 23 L. J. Q. B. 265, *ante*, p. 403.

Waite's position was much the same as if he had seen the bill of lading on the defendants' counter and taken it away without their knowledge or consent.

From the case of *Rodger* v. *Comptoir d'Escompte* (*e*), in 1869, it was thought that where a bill of lading was assigned in consideration of a pre-existing debt, the consideration was insufficient to defeat an unpaid vendor's right to stop in transitu, but the contrary was decided to be the law in *Leask* v. *Scott* (*f*), in 1877, in the Court of Appeal, where a past consideration not given at the time the bill of lading was handed over was held sufficient, and the argument that the valuable consideration must have been obtained by means of the bill of lading was disapproved of (*g*).]

Though, in order to devest the vendor's right to stop in transitu, the indorsement of the bill of lading must be in furtherance of a bargain to give an interest in the goods for a valuable consideration, it is not necessary that it should be a bargain to give the whole interest in the goods. *Lickbarrow* v. *Mason* (*h*) was itself a case of pledge, and yet the vendor's right to stop in transitu was devested.

[But the vendor's right to stop does not extend beyond the rights which his contract with his vendee gave him. If he contracted to sell the goods for a certain sum he has a right to that sum and nothing further. As James, L.J., said in *Ex parte Falk* (*i*), a case of pledge, the vendor can stop the equity of redemption. The pledgee or sub-vendee has the right to the goods on satisfying the vendor's claim and *paying the balance, if any, into the [*407] estate of the insolvent pledger or purchaser.

In *Re Westzynthus* (*k*), in 1833, the King's Bench decided that an indorsement of the bill of lading by way of pledge terminated the vendor's right of stoppage at law together, and so far was equivalent to an actual delivery to the pledgee, but from the shape in which the question came before the Judges, they were able to decide on questions of equity, and they decided that the stoppage in transitu so far as regarded the interest remaining in the purchaser was good in equity, and that consequently the unpaid vendor acquired by his stoppage in transitu a right to the surplus of the proceeds of the goods after the pledgee's advances had been paid off; and that he acquired also an equity to oblige the pledgee to pay himself, out of other securities in his hands, which were the absolute property of the insolvent, as far as they would go, before restoring to the goods *quasi* stopped in transitu (*l*).

(*e*) *Rodger* v. *Comptoir d'Escompte*, L. R. 2 P. C. 393; 38 L. J. P. C. 30.
(*f*) *Leask* v. *Scott*, L. R. 2 Q. B. D. 376; 46 L. J. Q. B. 576.
(*g*) *Chartered Bank of India* v. *Henderson*, L. R. 5 P. C. 501.
(*h*) *Lickbarrow* v. *Mason*, *ante*, p. 395.
(*i*) *Ex parte Falk*, 14 Ch. D. 452.
(*k*) *Re Westzynthus*, 5 B. & Ad. 817.
(*l*) See on Marshalling Securities, *Broadbent* v. *Barlow*, 3 De Gex, F. & J. 570, *Ex parte Alston*, *In re Holland*, 4 Ch. Ap. 168, in 1868; *Ex parte Salting*, *In re Stratton*, 25 Ch. D. 148, in 1883.

[In *Spalding* v. *Ruding* (*m*), in 1843, Spalding sold wheat to Thomas, who pledged the bill of lading with Ruding for 1,000*l.*, indorsing it to him. Thomas became bankrupt, without paying for the wheat. Spalding then stopped the wheat in transitu but allowed Ruding to get possession of it, giving him notice that he claimed the balance of the proceeds after Ruding had satisfied his claim for 1,000*l.* and charges; and Lord Langdale, M. R., held that he was so entitled. Ruding had claimed to hold the balance over the 1,000*l.* in satisfaction of a general balance between himself and Thomas (*n*).

In *Ex parte Golding, Davis and Co.* (*o*), in 1880, Golding and [*408] Co. sold to Knight and Son goods for 366*l.*, which *Knight and Son resold to Taylor and Co. for 370.: neither sums were paid; Knight and Son stopped payment, and Golding and Co. stopped the goods in transitu. It was held in the Court of Appeal that the trustee in bankruptcy of Knight and Son was entitled to the difference between those two sums, and Golding and Co. to the 366*l.*

And in *Ex parte Falk, In re Kiell* (*p*), in the Court of Appeal in 1880, reported in the House of Lords as *Kemp* v. *Falk* (*q*), in 1882, Kiell purchased salt from Falk to be shipped at Liverpool for Calcutta; Kiell gave his acceptance for the price, and the bill of lading was handed to him and indorsed by him to the Bank of Scotland for an advance. Wiseman, Mitchell and Co., who acted in this matter as Kiell's agents in Calcutta, sold the salt "to arrive" to various sub-purchasers. The salt arrive at Calcutta on the 29th of July, and on the 30th, Wiseman, Mitchell and Co., to whom the Bank of Scotland had forwarded the bill of lading, presented it to the shipowner's agents and received in exchange delivery orders for the whole cargo. Neither the shipowner's agents, nor Wiseman, Mitchell and Co. gave delivery orders to the sub-purchasers; but the arrangement was that the sub-purchasers should obtain delivery on producing to the captain receipts for the money paid by them in respect of their sub-purchases. Delivery over the ship's side commenced on the 3rd of August, but only a very insignificant amount had been delivered up to the 5th. Falk having heard of Kiell's insolvency, served on the 27th of July the shipowners in Liverpool a notice to stop the salt in transitu. On the 31st of July the shipowners telegraphed to the agents in Calcutta to stop it, and on the 2nd of August Falk telegraphed to the same effect to his agents. The cargo was delivered to the sub-purchasers, the proceeds remitted to the Bank of Scotland, who, after deducting their advance, paid the balance to Kiell's trustee. The balance was less than Kiell's dishonoured acceptance, and Falk claimed it. Both

(*m*) *Spalding* v. *Ruding*, 6 Beav. 376.
(*n*) *Coventry* v. *Gladstone*, in 1868, 6 Eq. 44; 37 L. J. Ch. 492.
(*o*) *Ex parte Golding, Davis & Co.*, 13 Ch. D. 628.
(*p*) *Ex parte Falk*, 14 Ch. D. 446.
(*q*) *Kemp* v. *Falk*, 7 Ap. Ca. 573.

the Court of Appeal *and the House of Lords held his claim [*409] to be good. Falk's rights as against the sub-purchasers, even if they had paid their money, were not affected by his pledge of the bill of lading to the Bank of Scotland, and he could assert those rights against the goods or their equivalent, the purchase-money, provided he stopped the goods before they had been delivered; and he had done so in this case.]

The transfer of the bill of lading in order to defeat the unpaid vendor,s right to stop in transitu, must not only be made for a valuable consideration, but it must be made fairly, and without the person who takes the transfer being aware of such circumstances as prevent the assignment from being fair and honest. But the transfer is not unfair merely because it has the effect of devesting the unpaid vendor's rights; and therefore in *Cuming* v. *Brown* (*r*), in 1808, where Jean, the vendor of goods, consigned them to Maine, the purchaser, and sent him the bills of lading, and drew on him for the price ; and then Maine pledged the bill of lading to Cuming, who at the time was aware of these facts, but did not know that Maine was insolvent; it was decided, that the vendor's right to stop in transitu was gone, and that Cuming might maintain trover for the goods against the defendant, who in obedience to the vendor (Jean) had stopped the goods after Maine failed. Lord Ellenborough said the question was, whether the indorsee took the bill without notice? but he said, "This expression is not to be understood in the restrained sense contended for, viz., without notice "that the goods had not been paid for, but without notice of such "circumstances as rendered the bill of lading not fairly and honestly assignable. The criterion being, according to Mr. J. Buller "in *Salomons* v. *Nissen* (*s*), does the purchaser take it fairly and "honestly? And so understanding that expression, or at any rate "understanding the rule of law on the subject, we think that in "this case no circumstance appears to have existed at the time of "the assignment of *this bill of lading, which should have [*410] "prevented the plaintiff from taking it, or which should now render it not available in his hands."

[In *Gilbert* v. *Guignon* (*t*), in 1872, Forbes and Co., merchants in California, agreed to ship a large quantity of corn to Kemp, a miller in Devonshire, payment at sixty days' sight against bill of lading. They shipped a cargo of wheat for him at the price of 5,625*l.*, taking six bills of lading, and drawing six corresponding bills of exchange on Kemp each for 5,625*l.* On the 12th of September they pledged three indorsed bills of lading together with three of the drafts with the Bank of British Columbia, the nominal defendants, and on the same day, but as the evidence showed by mistake, they sent to Kemp, together with the invoice, one of the

(*r*) *Cuming* v. *Brown*, 9 East, 506.
(*s*) *Salomons* v. *Nissen*, 2 T. R. 674.
(*t*) *Gilbert* v. *Guignon*, 8 Ch. Ap. 16.

other bills of lading indorsed in blank, which Kemp on the 11th of October pledged with the West of England Banking Company, the plaintiffs. The three bills were presented to Kemp with the bills of lading attached, and were accepted by him but dishonoured. The Bank of British Columbia then obtained possession of the cargo on the receipt of an indemnity from Forbes and Co. The West of England Banking Company claimed the cargo, alleging that they were the first indorsees of one of a set of bills of lading, and that the Bank of British Columbia had notice at the time of the pledge that Forbes and Co. had parted with the control of the cargo. The judgment of Lord Selborne, L.C., is not reported verbatim, but his Lordship dismissed the plaintiffs' appeal on the ground that Forbes and Co.'s inadvertence had not been the means of deceiving them.

Nor is the indorsee for value affected by any equity arising out of the agreement between the original vendor and the indorser, of which he has no notice; thus, in *Henderson* v. *The Comptoir d'Escompte de Paris* (*u*), in 1873, the plaintiff shipped goods to Lyall, [*411] Still and Co., who were to sell them *and appropriate the proceeds to meet his draft against the goods, instead of doing so, Lyall, Still and Co. indorsed the bill of lading to the defendants to whom they were indebted. The plaintiffs sought to have it declared that the defendants held the proceeds of the sale of the goods in trust for them, but the Privy Council dismissed the plaintiff's appeal.

In the case of *Meyerstein* v. *Barber* (*x*), in the House of Lords, in 1870, the rights between each other of *bonâ fide* pledgees of bills of lading in three parts were discussed. Cotton had been consigned to London under a bill of lading, making it deliverable to the shipper or assigns on payment of freight, and bills of exchange drawn against it had been discounted by the Chartered Bank of India, who held the bill of lading as security. The cotton arrived in London, and Abraham, who had succeeded the consignees in their business, had the goods landed at a sufferance wharf and entered in his name in the wharfinger's books as importer, where they lay under a stop for unpaid freight.

On the 4th of March Abraham obtained the bill of lading from the Chartered Bank, giving his cheque for it (*y*), and pledged it with the plaintiffs for an advance of 2,500*l.*, the plaintiffs asked for the "other" copy, and Abraham promised to send it to them, and did send the second copy later on. On the 6th and 7th of May he pledged the third copy with the defendants, who subsequently obtained possession of the cotton. Both the plaintiffs and the de-

(*u*) *Henderson* v. *The Comptoir d'Escompte de Paris*, L. R. 5 P. C. 253; 42 L. J. P. C. 60.

(*x*) *Meyerstein* v. *Barber*, L. R. 2 C. P. 38, 661 4 E. & I. App. 317; 36 L. J. C. P. 48, 289; 39 L. J. C. P. 187.

(*y*) See 2 C. P. 47.

fendants were pledgees for value without any notice of Abraham's fraud. One question was whether there could be a valid pledge of goods lying in a warehouse where the pledgee neither obtained a warrant or actual delivery (*z*). The plaintiffs obtained a verdict, and the Court of Common Pleas held that the bill of lading held by the plaintiff's was the symbol of property in the cotton, and its delivery to the plaintiffs operated as a delivery of the cotton itself. Erle, C.J., said the bill of lading at the date of the *fisrt [*412] pledge was not extinct, for although the cotton had been landed, it had not been delivered according to the bill of lading, and "if "Abraham had given a delivery order without the bill of lading, the "the wharfinger, as I read the evidence, would not have obeyed it "but would have withheld the cotton until the bill of lading was "produced." Willes, J., said, "I think the bill of lading remains "in force at least so long as complete delivery of possession of the "goods has not been made to some person having a right to claim "them under it. This judgment was affirmed in the Court of Exchequer Chamber and in the House of Lords, where Lord Westbury's judgment is highly instructive. He said (*a*), "There can be "no doubt, therefore, that the first person who for value gets the "transfer of a bill of lading, though it be only one of a set of three "bills, acquires the property; and all subsquent dealings with the "other two bills must in law be subordinate to that first one, and "for this reason, because the property is in the person who first "gets a transfer of the bill of lading. It might possibly happen "that the shipowner having no notice of the first dealing with the "bill of lading, may, on the second bill being presented by another "party, be justified in delivering the goods to that party. But "although that may be a discharge to the shipowner, it will in no "respect effect the legal ownership of the goods, for the legal owner-"ship of the goods must still remain in the first holder for value of "the bill of lading, because he had the legal right in the property."

On the subject of the carrier's liability see the judgment of Dr. Lushington in the 'Tigress' (*b*), which Mr. Benjamin seems to consider doubtful law (*c*), and the remarks of Lord Westbury in the case of *Meyerstein* v. *Barber* (*d*).

In *Glyn, Mills and Co.* v. *The East and West India Dock Co.* (*e*), in the House of Lords in 1882, Cottam, Morton and *Co., [*413] as consignees of sugar and holders of the bill of lading in three parts, making the sugar deliverable to themselves or their assigns, applied to and obtained from the plaintiffs an advance on depositing as security the first of the set of bills. The sugar arrived, and

(*z*) See Willes, J.'s judgment, L. R. 2 C. P. 52; 36 L. J. C. P. 57.
(*a*) 4 E. & I. App. 335; 39 L. J. C. P. 195.
(*b*) *The Tigress*, 32 L. J. Ad. 97.
(*c*) Benjamin on sales, 2nd. ed., p. 719.
(*d*) *Meyerstein* v. *Barber*, 4 E. & I. App. 336; 39 L. J. C. P. 195.
(*e*) *Glyn* v. *The East and West India Dock Co.*, 5 Q. B. D. 129; 6 Q. B. D. 475 7 Ap. Ca. 591; 49 L. J. Q. B. 303; 50 L. J. Q. B. 62; 52 L. J. Q. B. 146.

Cottam, Morton and Co. entered the goods at the Custom House, and the captain landed the goods with the defendants under a stop for freight. Cottam and Co. handed the defendants another set of bills, and the defendants then entered the sugar in their books in the name of Cottam and Co. The freight was subsequently paid, and Williams and Co. obtained possession of the sugar under an order from Cottam and Co. Cottam and Co. then became insolvent, and this action was brought by the plaintiffs as indorsees for value for an alleged conversion of the goods. The case was tried before Field, J. (*f*), in 1880, who gave a judgment for the plaintiffs which was reversed by the majority of Judges in the Court of Appeal (*g*), Brett, L.J., being of opinion that that judgment should be affirmed, Bramwell and Raggally, L. JJ., being of a contrary opinion. And the House of Lords (*h*) affirmed the Court of Appeal. Bramwell, L.J., said, "In my opinion, in such cases as these as a rule, where "there are no special circumstances, a wharehouseman receives the "goods from the ship or ship's captain on the terms of holding "them for the ship till the freight is paid, and then and thence-"forth of holding them to deliver to such person as the shipowner "or captain would have been justified in delivering them to under "the bill of lading. This is Mr. Justice Willes' opinion in *Meyer-"stein* v. *Barber* (*i*) * * * I cannot think that the warehouseman "undertakes a different duty to that of the shipowner. * * * Then "would the captain of the ship have been justified in delivering "these goods to Cottam and Co. on production of their bill of lading "and tender of the freight? I cannot bring myself to say he would "not."

[*414] *The view taken by Brett, L.J., was that the defendant held the goods for, and was bound to deliver the goods to the real owner, the holder of the bill of lading, *i. e.* the plaintiffs.

Lord Cairns said, "the dock company are under no higher liability "then the shipowner himself would have been, and on the other "hand, they are not under any lower or less liability." This also was the view of Lord Blackburn, who added that the captain's contract is to deliver to the assignee, not of the goods, but of the bill of lading.]

(*f*) 5 Q. B. D. 129; 49 L. J. Q. B. 303.
(*g*) 6 Q. B. D. 475; 50 L. J. Q. B. 62.
(*h*) 7 Ap. Ca. 591; 52 L. J. Q. B. 146.
(*i*) *Meyerstein* v. *Barber*, L. R. 2 C. P. 49; 36 L. J. C. P. 56.

*CHAPTER II. [*415]

DOCK WARRANTS, DELIVERY ORDERS, FACTORS.

THERE have been some attempts made to give the same effect to the indorsement of dock warrants, wharfingers' receipts, delivery orders, and similar documents, as is given to the indorsement of a bill of lading.

Those documents are generally written contracts, by which the holder of the indorsed document is rendered the person to whom the holder of the goods is to deliver them, and in so far they greatly resemble bills of lading; but they differ from them in this respect, that when goods are at sea the purchaser who takes the bill of lading has done all that is possible in order to take possession of the goods, as there is a physical obstacle to his seeking out the master of the ship and requiring him to attorn to his rights; but when the goods are on land, there is no reason why the person who receives a delivery order or dock warrant should not at once lodge it with the bailee, and so take actual or constructive possession of the goods. There is, therefore, a very sufficient reason why the custom of merchants should make the transfer of the bill of lading equivalent to an actual delivery of possession, and yet not give such an effect to the transfer of documents of title to goods on shore.

Besides this substantial difference between them, there is the more technical one that bills of lading are ancient mercantile documents which may be subject to the law merchant, whilst the other class of documents are of modern invention, and no custom of merchants relating to them has ever been established.

*In *Spear* v. *Travers* (*a*), in 1815, before Gibbs, C. J., at [*416] Nisi Prius, the special jury are reported to have observed;—"that "in practice, the indorsed dock warrants and certificates are handed "from seller to buyer as a complete transfer of the goods;" and there is no doubt that such is the fact, but the observation was no part of their verdict, and if it was meant as an expression of opinion that the transfer of the dock warrant was equivalent to a delivery of possession of the goods, it was quite irrelevant to the case before them. The facts were, that the defendants sold sugar to Meaby, and handed him the dock warrants. Meaby paid them. Then Meaby sold the sugar to Greaves, and handed him the dock warrants, and Greaves accepted drafts for the price. Then Greaves transferred the dock warrants to Spear, who advanced him 2,000*l.* on the security of it. Then Greaves failed, and his acceptances were dishonoured. The goods all this time stood in the name of the defendants, and they by a false statement to the dock company,

that the original dock warrant was lost, obtained a duplicate under which they got the goods. Spear brought trover, and Gibbs, C. J., said;—"I think the defendants had no right to stop the goods. "They had been paid for them. This is an improper attempt on "their part to assist Meaby. They have not got possession of the "goods by the exercise of any right to stop in transitu, but by a "falsehood. I am of opinion, that the plaintiff to whom the certifi-"cate was transferred for a valuable consideration, is entitled to "recover." The only point decided in that case was, that Spear had a legal property sufficient as against a wrong doer, and it is clear that a sale to him would have given him such a property if there had been no dock warrant in existence. There may, perhaps, be a difference as to the effect of a pledge without delivery of possession, but that distinction does not seem to have been made in *Spear* v. *Travers* (*a*).

[*417] In *Zwinger* v. *Samuda* (*b*), in 1817, the facts were, that *Roebuck pledged goods lying in the docks, with Samuda, and the goods were transferred into Samuda's name. Then Roebuck sold the goods to Zwinger. Roebuck applied to Samuda for the dock warrants, and he refused to give them until he was paid off his advances. Roebuck by a false pretence, (to which Zwinger was no party), got him to take a worthless cheque in payment of his advances, and to indorse the dock warrant to Zwinger, who thereupon paid Roebuck the price of the goods. As soon as Samuda discovered the trick, he countermanded the delivery order, and seized the goods. Zwinger brought trover and recovered. Sir James Allen Park, at Nisi Prius, seems to have likened the indorsement of dock warrants to that of bills of exchange, and on a motion for a new trial, he seems to have thought they were like bills of lading at least; but Burrough, J., said:—"I hope it will be understood that "the Court does not proceed upon any thing like a custom in this "case. * * * The defendant has been paid for the goods, for "Roebuck and the defendant are one. * * * Who is it who "credits Roebuck but the defendant? We therefore have the con-"tract of sale and the payment complete, which transfer the prop-"erty, and though there also exists in the case this document, what "difference does it make? it does not *invalidate* the sale."

In *Lucas* v. *Dorrien* (*d*), in 1817, the owner of sugar pledged the dock warrants with the defendants. Some time after the pledge the defendants lodged the dock warrants which had been indorsed to them, and the company assented to the transfer. The next day the pledger became bankrupt. His assignees brought trover. No question could arise upon the negotiability of the dock warrants, as the delivery was executed before the bankruptcy; but though the

(*a*) *Spear* v. *Travers*, 4 Camp. 251, but see *ante*, p. 387.
(*b*) *Zwinger* v. *Samuda*, 7 Taunt. 265.
(*d*) *Lucas* v. *Dorrien*, 7 Taunt. 278.

point did not arise, both Dallas, J. and Park, J. intimated an opinion that the dock warrants were negotiable by some custom of trade.

In *Keyser* v. *Suse* (*e*), in 1818, the question arose. The unpaid vendor gave the purchaser the dock warrants, and he *trans- [*418] ferred them by way of pledge, to Keyser the plaintiff. Before Keyser notified this transfer to the dock company, the purchaser failed, and the original vendor gave notice of countermand to the dock company. Keyser brought trover. Dallas, J., at Nisi Prius, intimated a strong opinion that the transfer of the dock warrant for value put an end to the vendor's right to stop in transitu, and directed a verdict subject to leave to enter a nonsuit. The parties however compromised the case.

It is to be observed that these authorities amount to no more than expressions of opinion at Nisi Prius, by two learned Judges, Park, J. and Dallas, J., which are too little to establish a custom the effect of which is not to put a construction upon the intention of the parties, or the meaning of the documents of title, but to give an effect to them different from that which at common law they would have.

There does not seem to be any ground for maintaining that the vendor, who has given a delivery order to a purchaser from him, is thereby precluded from setting up his rights as against third parties, who may have made advances on the faith of the delivery order. He cannot set up any case inconsistent with the document which he has given to his purchaser, and on which he has allowed him to get credit. He cannot therefore deny, that the person to whom he has handed the delivery order had a right to obtain possession. But this is so far from being inconsistent with the case of one who is stopping in transitu, that it is a necessary and essential ingredient in it. He can exercise no right to stop the goods in transitu, unless the purchaser had a vested right both of property and possession, defeasible on his insolvency, and it is impossible to say that the possession of a delivery order imports any thing more than this.

It is therefore submitted, that the indorsement of a delivery order, or dock warrant, has not (independently of the Factors Acts) any effect beyond that of a token of an authority to receive possession.

[In *Jenkyns* v. *Usborne* (*f*), in 1844, Hunter and Coventry *of London, had agreed to purchase a certain quantity of [*419] beans from Lloyd of Leghorn. Lloyd consigned to them a much larger quantity, and the plaintiff, who was Lloyd's London agent, agreed to take the excess from them and paid for it. Lloyd had made out a bill of lading for the entire quantity and sent it through the plaintiff to Hunter and Coventry, and they gave to the plaintiff a delivery order addressed to the captain for the excess quantity in

(*e*) *Keyser* v. *Suse*, Gow. 58.
(*f*) *Jenkyns* v. *Usborne*, 7 M. & G. 678; 13 L. J. C. P. 196.

these words, "Please deliver to the bearer 1,442¾ sacks of beans, ex Agnes, Hunter and Coventry." The plaintiff then sold the beans to Thomas, and handed him the delivery order. Thomas gave his acceptances in payment, and then pledged the order with the defendant. Thomas stopped payment, and as soon as the ship arrived the plaintiff instructed the captain not to deliver the beans. The captain delivered the beans belonging to Hunter and Coventry to them, and the remainder to the defendant. The plaintiff obtained a verdict, which was upheld. Tindal, C.J., saying, "Thomas was "not in possession of the bill of lading: he had only an order on "the captain to deliver the goods on arrival" (*g*).

In *Farina* v. *Home* (*h*), in 1846, the agent of a foreign consignor warehoused goods and handed the delivery warrant to the defendant, the purchaser, who kept it ten months, but eventually refused to pay for the goods. The action was for goods sold and delivered, the defendant contending that there had been no delivery. At the trial the plaintiff obtained a verdict, but the Court of Exchequer granted a new trial, and Parke, B., said: "The delivery and receipt "of the warrant was not in effect the same thing as the delivery "and receipt of the goods. * * * This warrant is no more than an "engagement by the wharfinger to deliver to the consignee, or any "one he may appoint."

The case of *M'Ewan* v. *Smith* (*i*), was heard on appeal in the [*420] House of Lords in 1849 from the Court of Session. *Smith and Co., the vendors, instructed Alexander to place certain sugars in Little's warehouse. Little entered them as "Received from James Alexander for J. and A. Smith." Smith and Co. then sold the sugar to Bowie and Co., and gave them a delivery order on Alexander. Bowie and Co. took no steps to get possession of the sugar, but sold it to M'Ewan and Co. and handed them the delivery order on Alexander. On the 19th of September, Alexander had written to Smith and Co., giving them a statement of the weight of the sugar, of his warehouse and delivery charges. The statement of the weights was headed "Weights of forty-two hhds. of sugar, &c., delivered Messrs. James Bowie and Co." On the 25th of September M'Ewan and Co. sent to Alexander's office, and there produced the original delivery order on Alexander which Bowie and Co. had given them. A clerk of Alexander's then made this entry in a book in which the weights were entered when weighing over, "Delivered to Messrs. M'Ewan and Sons," and gave them a note in the following form, "Deliver to Messrs. William M'Ewan and Sons 42 hhds. sugar." At the date of the trial the latter word "deliver" had been altered into "delivered." On the 26th of September Smith and Co. heard of Bowie and Co.'s insolvency, and instructed Alexander to take steps to stop delivery, and on the 27th Alexander

(*g*) But see now 40 & 41 Vict. c. 39, s. 4.
(*h*) *Farina* v. *Home*, 16 M. & W. 119; 16 L. J. Ex. 73.
(*i*) *M'Ewan* v. *Smith*, 2 H. L. R. 309; 13 Jur. 265.

removed the sugar to another warehouse. The Court of Session gave judgment for the vendors, and was affirmed in the House of Lords. It was argued for M'Ewan and Co. that the delivery to them of the delivery order had the same effect in destroying the vendor's right to resume possession that the delivery of a bill of lading would have had, but the House of Lords dissented from that view. Nor did the House of Lords consider that the sugar had been constructively delivered by means of the memorandum. Lord Cottenham, L.C., said: "The memorandum did not constitute a de-"livery, for they "(the sugars) were not in the hands of Alexander, "by whom the document was given, but in those of the warehouse-"men Messrs. Little, to whom the order was directed. It was not the acknowledgment, of a fact done by the person who *made [*421] "the acknowledgment, but was an order to a third person, who "might or might not think fit to execute it."

In *Gunn* v. *Bolckow, Vaughan and Co.* (*k*), in 1875, the defendants contracted to manufacture rails for the Aberdare Iron Co., the contract stating "payment to be made by buyer's acceptance of seller's drafts at six months date, against inspector's certificate of approval and wharfingers's certificate of each 500 tons being stacked ready for shipment." The rails were made, and the inspector and wharfinger gave their certificates, the wharfinger's being in the terms following, "I hereby certify that there are lying at the works of Bolckow, Vaughan and Co. 500 tons of iron rails which are ready for shipment." The certificates were from time to time, as the iron was ready, delivered to the Aberdare Co. in exchange for their acceptances. The Aberdare Co. pledged them with Toms, and subsequently became insolvent; Toms died, and his administrator claimed a lien on the rails for the sum advanced. The Court of Appeal, consisting of James and Mellish, L.JJ., held that the defendants' rights as unpaid vendors, were not affected by the dealings with the certificates. It is obvious in this case, that the documents were merely statements that the iron was ready for delivery; and were not made by the vendors. They were not documents in which the vendors promised that the iron should be delivered by them to the holders, as in the next case, viz., *Farmiloe* v. *Bain* (*l*). Nor were they documents given by the vendors authorising the holders to obtain delivery of the goods from some warehouseman, as in *Jenkyns* v. *Usborne* (*m*), so that it could not even have been argued that it was a case of the vendor having undertaken not to exercise his right to stop the goods. The only way in which the plaintiff could make a case was by attempting to show that there was a custom in the trade to treat these certificates as if they were such documents. But Mellish, L.J., pointed out very clearly that *even if that were so, although it might be very good evi- [*422]

(*k*) *Gunn* v. *Bolckow, Vaughan & Co.*, 10 Ch. Ap. 491; 44 L. J. Ch. 732.
(*l*) *Farmiloe* v. *Bain*, 10 C. P. D. 445; 45 L. J. C. P. 264.
(*m*) *Jenkyns* v. *Usborne*, 7 M. & G. 678; 13 L. J. C. P. 196.

dence of an equitable charge between the pledgor and pledgee, it could not possibly affect the vendor's rights. He said: "The "vendor, having agreed by his contract that he would give the "wharfinger's certificate in order that the purchaser may have evi-"dence that the goods have been actually made, and now are actually "ready to be shipped, cannot help giving the certificate; and how "the fact of his giving that certificate, which does not profess to "be negotiable, and does not profess to require the delivery of the "goods to order or to bearer, or anything of the kind, can affect "his lien as vendor, merely because the purchaser chooses to bor-"row money on the faith of it, I am at a loss to conceive."

In the case of *Farmiloe* v. *Bain* (*n*), in 1876, the defendants sold to Burrs and Co., 100 tons of zinc, giving them four documents each in the following words: "We hereby undertake to deliver to your order indorsed hereon twenty-five tons merchantable sheet zinc, off your contract of this date." Burrs and Co. then sold fifty tons of the zinc to the plaintiffs, and indorsed to them two of those documents. The plaintiffs gave their acceptances for the price. Burrs and Co. then became insolvent, not having paid for the zinc, and the Court, consisting of Brett, Archibald, and Lindley, JJ., held that these documents did not amount to a representation that the goods were the goods of Burrs and Co., freed from the unpaid vendor's lien, and that the unpaid vendors might set up their lien. Brett, L.J., said "It is admitted that the document in question is not "known document amongst merchants; therefore the Court must "look at it as they would at any other ordinary written instrument. "So looking at it, it obviously contains no representation of any "fact, and the plaintiffs had no right to rely upon it as such a "representation; and consequently they do not bring themselves "within either of the propositions as to estoppel, which I ventured [*423] "to lay down in *Carr* v. *L. & N. W. Ry Co.* (*o*), *and to "which I still adhere. It was a mere undertaking or contract be-"tween the plaintiffs and their immediate vendees."

In the *Imperial Bank* v. *The London and St. Katherine Docks Co.* (*p*), in 1877, Messrs. Carter sold 18 casks of gum sandrac, lying at the defendant's docks, to Dalton, a broker, who purchased for undisclosed principals. Messrs. Carter signed a delivery order addressed to the defendants, requiring delivery to Dalton's order. Dalton's undisclosed principals were Brousson and Co., and Dalton indorsed the delivery order to them, and they pledged it with the plaintiffs, who deposited it with the defendants. But the defendants gave no delivery warrant, and had done nothing amounting to an attornment to the plaintiffs. When Dalton discovered that Brausson and Co. were insolvent, he sent a cheque for the price of

(*n*) *Farmiloe* v. *Bain*, 1 C. P. D. 445; 45 L. J. C. P. 264.
(*o*) *Carr* v. *L. & N. W. Ry. Co.*, 10 C. P. 316; 44 L. J. C. P. 113.
(*p*) *Imperial Bank* v. *London & St. Katharine Docks Co.*, 5 Ch. D. 195; 46 L. J. Ch. 335.

the gum to Messrs. Carter, and at about the same time sent a clerk to the defendant's offices and obtained from the defendants a warrant for the goods in the name of Messrs. Carter. Dalton then sent the warrant to Messrs. Carter, who indorsed it to him (and gave him a second delivery order). Jessel, M. R., held that the effect of the indorsement to the plaintiffs was to authorise them to obtain delivery of the goods, and, if they had done so, or if they had obtained a constructive delivery by getting the dock company to hold as their bailees, there would have been an end of the matter; but they had not done so, their title had not been recognised by entry in the defendant's books, and therefore the unpaid vendor's lien had not been discharged.

In the *Merchant Banking Co.* v. *The Phœnix Bessemer Steel Co.* (*q*), in 1877, the defendants contracted to make and sell to Smith and Co. 5000 tons of steel rails free on board at Liverpool. From time to time, as portions of the rails were ready to be forwarded, the defendants gave Smith and Co. warrants in the following form: —"The under-mentioned *iron will not be delivered to any [*424] party but the holder of this warrant. Phœnix Bessemer Steel Company, Limited. No. 88. Dec. 19, 1874. Stacked at the works of the Phœnix Bessemer Steel Company, The Ickles, Sheffield. Warrant for 403 tons steel rails. Iron deliverable (f. o. b.) to Messrs. Gilead A. Smith and Co. of London, or to their assigns by indorsement hereon." Then followed the particulars of the rails, and the words, "to be delivered free on board at Liverpool." Together with each warrant, the defendants sent an invoice in the following form :—"Messrs. Gilead A. Smith and Co., London. Bought of the Phœnix Bessemer Steel Company, Limited, stacked on these works to your order, to be delivered f. o. b. at Liverpool according to your instructions." Then followed the particulars of the rails. Smith and Co. pledged the warrants with the plaintiffs, and became insolvent. The defendants claimed a lien as against the plaintiffs, as unpaid vendors. Evidence was given at the trial that by warrants such as these, which stated the iron to be deliverable to the purchasers or their assigns by indorsement, it was understood that the unpaid vendor had given up his lien. Jessel, M. R., held that the custom had been proved, that a person giving such a warrant must be taken to know the custom, and virtually tells the trade, when he issues the warrant, that the goods are free from the vendor's lien. His Lordship also stated that in the particular circumstances of this case, the defendants must have known that the warrants were intended to be used for the special purpose of pledging, and could not, therefore, be heard to set up their lien against the plaintiffs (*r*).

In all these cases there is no question about the property, whether

(*q*) *Merchant Banking Co.* v. *Phœnix Bessemer Steel Co.*, 5 Ch. D. 205; 46 L. J. Ch. 418.

(*r*) See also *Dixon* v. *Bovill* in 1856, 3 McQueen, 1.

it be such as a vendee or a pledgee has, having passed to the plaintiff. That is admitted. The question is, can the unpaid vendor, notwithstanding that the property has passed, stop the goods in transitu, or, what is much the same thing, refuse to make delivery? [*425] It does not seem to be capable of argument, that the *indorsement of delivery of a delivery order or warrant would operate as a matter of law in the same way that the delivery or indorsement of a bill of lading would do, to determine the unpaid vendor's right to stop the goods or withhold delivery.

Nor can it be said that the vendor's rights to withhold delivery from the holder are destroyed by reason of the indorsement operating as an assignment to him of the vendee's contract with the vendor, for such an assignment would, unless there was an express agreement to the contrary, be subject to equities between the vendor and vendee, and one of these equities would be the vendor's right to stop the goods.

If, then, the vendor's rights to withhold delivery from the holder are gone, the question seems to resolve itself into this: Has the vendor represented to the person holding the warrant or delivery order that, as against him, he has waived his lien? Has he estopped himself from exercising his right to stop the goods?

And in considering these cases, the distinction must be borne in mind between the case where the vendor makes a promise to the vendee to deliver the goods to him, or to some one named by him, and the case where the vendor makes a promise to the vendee, and also makes a promise to every one into whose hands the order or warrant may come, to deliver the goods to the holder. In the first case, the promise made is made to the vendee, and not to the holder: in the second, it is made to the vendee, and also to the holder.

If this be the correct view, it seems to be a question of fact in each case whether the representation, supposing the document to contain one, was made to the holder or not.

In the last case, *The Merchant Banking* Co. v. *The Phœnix Bessemer Steel Co.* (*s*), it seems to have been proved that the representation had been so made.

And in *Farmiloe* v. *Bain* (*t*), there appears to have been no such [*426] representation, for, as Brett, L.J., said, "It is admitted *that "the document in question is not a known document amongst mer-"chants" (*u*).]

It only remains to observe, that the Factors Acts seem not to be applicable to the case of a purchaser who, as such, is possessed of delivery orders or other documents of title to the goods which he

(*s*) *Merchant Banking Co.* v. *Phœnix Bessemer Steel Co.* 5 Ch. D. 205; 46 L. J. Ch. 419.

(*t*) *Farmiloe* v. *Bain*, 1 C. P. D. 445; 45 L. J. C. P. 264.

(*u*) A memorandum of the terms on which a wharfinger's warrant was pledged does not require to be registered as a bill of sale, *In re Cunningham*, 28 Ch. D. 682.

has bought, and consequently that the unpaid vendor's rights of stoppage in transitu, and his analogous rights of countermanding the authority to deliver, remain such as they were before the passing of these Acts (*x*).

[The main object of these Factors Acts was to secure a *bonâ fide* purchaser or pledgee who had made advances to a factor known to be such, either on the security of the goods themselves or of the documents of title to the goods, against the real owner. The remarks of Willes, J., in the course of his judgment in *Fuentis* v. *Montis* (*y*), show very distinctly what were the objects sought to be attained. He said the question is, "How far a person who is not "the real owner of goods, but who appears to the world, or rather "to those who deal with him, as owner, and who deal with "him on the faith of his apparent ownership, should be allowed to "confer upon a third person a greater title than he himself has. "* * * Every one is agreed that with respect to the ordinary cur-"rency, and bills of exchange whilst running, a person who receives "them *bonâ fide* and for value is entitled to hold them, notwith-"standing any infirmity of title in the person from whom he obtains them (*z*). That, however, is far from being so as to "ordinary merchandise;" and after referring to the exceptional cases of sales in market overt and the sale of goods under circumstances in which the owner might have rescinded the contract on the ground of the buyer's fraud, and to the case where the owner had clothed an agent with an apparent authority to deal with the goods, *he continued, "These instances, however, are ex- [*427] "ceptional to the rule, that no man can give a better title to goods "than he has himself, and that the real owner is not bound except "to the extent of an interest which he has parted with or an au-"thority which he has given. Now, the result of that state of the "law with respect to agents employed to sell, led to the course of "legislation which is known by the general description of the Fac-"tors Acts; because it was held by the Courts of Law that the case "of a *pledge* of goods by a factor intrusted with the possession of "goods, and authorised to sell them, fell within the general rule, to "which the instances above enumerated are exceptions, and that it "did not fall within the exceptions by reason of a pledge being an "ordinary and accustomed transaction to be entered into by a per-"son intrusted as agent to sell, or perhaps more properly by reason "of the Courts of Law having treated a pledge as being out of the "scope of an authority to sell. The Legislature seem to have con-"sidered that to be too narrow a view of the proper scope of the "authority of an agent to sell; and they were no doubt induced to "think so by reason of the altered mode of conducting mercantile "transactions in modern times, and because it had become a usual

(*x*) But see now 40 & 41 Vict. c. 39, s. 4 and s. 5, *post*, pp. 442 and 439.
(*y*) *Fuentes* v. *Montis*, L. R. 4 C. P. 93; 38 L. J. C. P. 95.
(*z*) See *ante*, p. 170.

"and accustomed course for factors intrusted with goods for sale, "to make advances to their principals, either in money or by the "acceptance of bills against their consignments, and to keep them-"selves in funds by repledging the documents of title with bankers "or other money dealers."

Lord Blackburn, in the case of *Cole* v. *The North-Western Bank* (*a*), said, "The general rule of law is, that where a person is de-"ceived by another into believing he may safely deal with prop-"erty, he bears the loss, unless he can show that he was misled by "the act of the true owner. The Legislature seems to us to have "wished to make it the law, that, where a third person has en-"trusted goods, or the documents of title to goods, to an agent, "who in the course of such agency sells or pledges the goods, he [*428] "should be *deemed by that act to have misled any one who "*bonâ fide* deals with the agent and makes a purchase from or an "advance to him without notice, that he was not authorised to sell "or to procure the advance."

The factor's power chiefly depended upon the 2nd section of 6 Geo. 4, c. 94, by which it was in substance enacted], that any person entrusted with, and in possession of any document of title to goods, shall be taken to be the true owner of the goods, so far as to give validity to any contract made by him for the sale or pledge of the goods to a person who has not notice that he is not the actual and *bonâ fide* owner (*b*).

The meaning of the word "intrusted" in this section, which word occurs in all the Factors Acts, was much considered in two important causes, *Phillips* v. *Huth* (*c*), and *Hatfield* v. *Phillips* (*d*), arising out of the following transaction. Phillips was the owner of two cargoes of tobacco, and he placed the bills of lading in the hands of Warwick, as his factor, for sale. The bills of lading were indorsed to Warwick. The goods arrived, and were deposited in the dock warehouses in the name of Warwick, the indorsee of the bill of lading. Warwick, in consequence of being the indorsee of the bill of lad-

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(*a*) *Cole* v. *The North-Western Bank*, L. R. 10 C. P. 372; 44 L. J. C. P. 242.

(*b*) [The words of the second section of 6 Geo. 4, c. 94, are, "Any person "* * intrusted with and in possession of any bill of lading, India warrant, "dock warrant, warehouse-keeper's certificate, wharfinger's certificate, war-"rant or order for delivery of goods, shall be deemed and taken to be the true "owner * * of the goods, * * described and mentioned in the said * * "documents, * * so for as to give validity to any contract or agreement "* * made or entered into by such person * * with any person * * "for the sale or disposition of the said goods, or for the deposit or pledge "thereof * * as a security for any money or negotiable instrument * * "advanced or given by such person * * upon the faith of such several doc-"uments * * , or otherwise that such person * * so intrusted as afore-"said is * * not the actual and *bonâ fide* owner * * of such goods * * "so sold or deposited or pledges as aforesaid."]

(*c*) *Phillips* v. *Huth*, 6 M. & W. 572.

(*d*) *Hatfield* v. *Phillips*, 9 M. & W. 647, in 1842, 14 M. & W. 665; 12 Cl. & F. 343.

ing, and the person in whose name the goods were deposited, was enabled to have dock warrants made out in his own name. He did do so, not for the purpose of selling the goods for the owner, but with the fraudulent purpose *of raising money for himself. [*429] He pledged some of the dock warrants with Huth, and others with Hatfield, for large sums of money. Hatfield and Huth, respectively, *bonâ fide* believed that Warwick was the owner of the goods. The two actions were to try whether the pledges were valid or not as against Phillips.

Phillips v. *Huth* (*e*) was first tried in 1839, before Gurney, B., and the jury found a verdict for the defendant. The Court of Exchequer granted a new trial, on the ground that the pledge was not binding on the owner of the goods at common law, and that Warwick was not intrusted with the dock warrants within the meaning of the Act. Parke, B., in delivering the judgment of the Court, said, "The principal question is, as to the meaning of the second "section of the 6 Geo. 4, c. 94, commonly called the Factors Act. "Before the passing of this Act, or rather of the previous Factors "Act, the 4 Geo. 4, c. 83, it was clearly settled, that a factor or "agent for sale had no power to pledge, whether he was in possession of the goods themselves, or of the symbol of the goods, and "even though the symbol might bear on the face of it some evidence of the property being in himself, as in the case of a bill of "lading, in which he was the consignee or indorsee. This was in "accordance with the general rule, that he who deals with one acting *ex mandato*, can obtain from him no better title than his "mandate enables him to bestow.

"But this rule was thought by some to be attended with hardship "on merchants and others dealing with factors, on the faith of their "being principals, and the Legislature, by the 4 Geo. 4, first relaxed this rule, and by the 6 Geo. 4, extended that relaxation. * * * It is very clear that the second section of the 6 Geo. 4, relaxes the rule of the common law, only with respect to those who "deal with persons who are not merely in possession of, but are "also *intrusted* with the symbol of property. However great the "hardship may be on innocent persons, and whatever they *"may have supposed from finding another in possession of [*430] "a document bearing the *indicia* of property in himself, still the "statute does not apply, and they can acquire no title by virtue of "it, unless the document has been intrusted to that person."

Phillips v. *Huth* (*f*) was compromised, but *Hatfield* v. *Phillips* (*g*) was tried before Lord Abinger, who directed the jury to consider whether an *intrusting* of the document (the dock warrants made out in Warwick's name) was proved. He expressed a very strong opinion, that there could not, in fact, be an intrusting of a

(*e*) *Phillips* v. *Huth*, 6 M. & W. 572, in 1840.
(*f*) *Phillips* v. *Huth*, 6 M. & W. 572.
(*g*) *Hatfield* v. *Phillips*, 9 M. & W. 647.

document, the very creation of which was a breach of trust, but declined to define intrusting as a matter of law, further than that it implied privity and consent. Under this direction, the jury found for the plaintiff. The cause was taken by writ of error into the Exchequer Chamber (*h*), and the Judges there expressed their concurrence in the doctrine of the Exchequer in *Phillips* v. *Huth* (*f*), and affirmed the judgment. The case was taken into the House of Lords, and the judgment of the Exchequer Chamber was affirmed (*h*).

In the meantime, in the year 1842, the Legislature passed the statute 5 & 6 Vict. c. 39 (*i*), which was prospective only, but by the fourth section makes such pledges as that in *Hatfield* v. *Phillips* (*h*) valid.

[Another object of this statute effected by the first section was to give to persons dealing as *pledgees*, and having notice of the agency, with agents intrusted with the goods or the documents of title to goods, the same security that persons dealing as *purchasers*, and having notice of the agency, with agents intrusted with the goods already had by virtue of the fourth section of 6 Geo. 4, c. 94 (*k*).

[*431] *By the first section of 5 & 6 Vict. c. 39, it was enacted that "Any agent who shall thereafter (1842) be intrusted with the "possession of goods, or of the documents of title to goods, shall "be deemed and taken to be owner of such goods and documents, "so far as to give validity to any contract or agreement by way of "pledge, lien, or security *bonâ fide* made by any person with such "agent so intrusted, and such contract or agreement shall be bind-"ing upon and good against the owner of such goods, notwith-"standing the person claiming such pledge may have had notice "that the person with whom such contract or agreement is made is "only an agent."]

The enactments, however, of 5 & 6 Vict. c. 39 are all in express words confined to "agents intrusted with possession," a word which excludes a purchaser, and, consequently, prevented the last statute

(*h*) *Hatfield* v. *Phillips*, 14 M. & W. 665; 12 Cl. & F. 343.

(*i*) 5 & 6 Vict. c. 39, s. 4, *post*, p. 432.

(*k*) [The fourth section of 6 Geo. 4, c. 94, enacted "That * * it shall be "lawful to and for any person * * to contract with any agent * * in-"trusted with any goods * * , or to whom the same may be consigned, "for the purchase of any such goods * * , and to receive the same of and "pay for the same to such agent * * , and such contract and payment shall "be binding upon and good against the owners of such goods * * , not-"withstanding such person * * shall have notice that the person * * "making such contract * * is an agent * * : provided, such contract "and payment be made in the usual and ordinary course of business, and that "such person * * shall not, when such contract is entered into or payment "made, have notice that such agent * * is not authorised to sell the said "goods, or to receive the said purchase-money," By s. 1 of 6 Geo. 4, c. 94, it was enacted in substance that where goods were intrusted to any person who ships them in his own name, and gets an advance from the consignee, he shall be taken to be the true owner so as to give the consignee a lien, provided the consignee had notice of the agency, see *Mildred* v. *Maspons*, 8 Ap. Ca. 884.]

from having any effect on the vendor's rights (*l*). But this defect has been remedied by the fourth section of the Factors Act of 1877 (*m*).

The second section of 6 Geo. 4, c. 94 uses the words "person intrusted," and though there seems good reason for contending that the object of that statute, and the evil which it was meant to remedy, confine the enactment to persons intrusted, somewhat in the nature of agents for sale, so as to give the Act the same meaning as if the word agent had been used as in 5 & 6 Vict. c. 39, instead of person, yet that is not clear. *Phillips* v. *Huth* (*n*), however, shows that the words *of that section are not to be taken in a very liberal [*432] sense, and if the Legislature did mean to enact that a purchaser, who had not taken possession of goods, might defeat the vendor's rights by the indorsement of a document of title, they have not used language very well adapted to express their intention.

[It will be noticed that the case is unprovided for in the earlier Acts, where the vendor, having sold the goods, retained possession of the documents of title, and then sold or pledged them to a *bonâ fide* purchaser or pledgee. And that sales or pledges by a vendee were not provided for, as sales by an "agent intrusted" were. Both of these defects have now been remedied by the Factors Act of 1877, 40 & 41 Vict. c. 39, by the 3rd section of which it was enacted in substance that where goods have been sold and the vendor continues in possession of the documents of title thereto, any sale or pledge of the goods or documents made by the vendor or by any person or agent intrusted by the vendor with the goods or documents shall be as valid as if the vendor or person were an agent intrusted by the vendee with the goods or documents. And section 4 of the same Act enacts in effect, that where goods have been sold and the vendee obtains the possession of the documents of title thereto from the vendor, any sale or pledge of such goods or documents by the vendee or by any other person or agent intrusted by the vendee with the documents shall be as valid as if the vendee or other person were an agent intrusted by the vendor with the documents within the meaning of the Factors Acts. The construction of 5 & 6 Vict. c. 39 and of the previous Acts came under the consideration of the Courts in the following cases.

Baines v. *Swainson* (*o*), in 1863, turned upon the fourth section of 6 Geo. 4, c. 94; the plaintiffs, who were cloth manufacturers, were applied to by Emsley, a factor and commission agent, who said he could find them purchasers, and mentioned Sykes and Son, a firm known to be of good standing. The plaintiffs sent the cloth to

(*l*) A merchant's clerk is not an agent within the meaning of the Factors Acts, *Lamb* v. *Attenborough*, in 1862, 1 B. & S. 831; 31 L. J. Q. B. 41 *post*, p. 435.

(*m*) 40 & 41 Vict. c. 39, s. 4, *post*, p. 432.

(*n*) *Phillips* v. *Huth*, 6 M. & W. 572.

(*o*) *Baines* v. *Swainson*, 4 B. & S. 270; 32 L. J. Q. B. 281; *post*, p. 437.

Emsley's warehouse for the purpose of having it sent on to Sykes, [*433] but Emsley fraudulently *sold the goods to the defendants, who bought *bonâ fide*. It was argued for the plaintiffs that Emsley was not an agent within the meaning of 6 Geo. 4, c. 94, s. 4, but was merely an agent to receive the goods and pass them on to Sykes. And Martin, B., at the trial was of this opinion. On the motion the Court ordered a new trial, holding that Emsley was such an agent and was intrusted. Blackburn, J., speaking of what amounts to an intrusting, said, "I do not agree with the counsel "for the defendants, that the mere fact of an agent being "found in possession of the goods, although they have been handed "to him by the owner, knowing that he carries on such a business "(*i. e.* one which in the ordinary course leads to sales and pay-"ments), amounts to an 'intrusting' him as agent; though I think "that under that part of seection 4 of stat. 5 & 6 Vict. c. 39, to "which I have referred (*p*), the fact of a person being put in pos-"sesion of goods calls upon the person who gave him possession to "explain and show that it was not an intrusting. There are many "cases to which my brother Compton has alluded, in which goods "might come into the possession of a known agent from having been "lent or pledged to him, or hired by him; but that in my opinion, "independently of authority, would not be an intrusting. * * * "Therefore, the question to be determined is, whether these goods "passed from the owners to Emsley as a branch of that agency in "which, according to the ordinary course of business, he would "have to sell goods belonging to others, and receive payment for "them. If they so came into his possession, they came to him in "the ordinary way. When a man employs an agent, part of whose "business it is to sell goods and receive payment as such agent, and "puts him in possession of goods, he places him in the position of "a man at common law having authority to sell or pledge the goods; [*434] "he may have given private *instructions to his agent, but "unless the third person who dealt with that agent had notice of "them the owner would, at common law, be bound by the act of "the agent. I construe the Factors Acts as saying that an agent "whose business is to sell goods and receive payment for them "shall, by virtue of stat. 6 Geo. 4, c. 94, s. 4, be clothed with ap-"parent authority to sell, and by virtue of stat. 5 & 6 Vict. c. 39, "which greatly extends the former Act, shall be clothed with ap-"parent authority to pledge the goods, provided he sells or pledges "them in the ordinary course of business: the owner shall be exactly "in the position of an owner at common law who has clothed him "with such authority; and his private instructions shall go for

(*p*) [The part referred to is, "And an agent in possession as aforesaid of such "goods or documents shall be taken, for the purposes of this Act, to have been "intrusted therewith by the owner thereof, *unless the contrary can be shown in* "*evidence.*" This section has now been amended by the second section of 40 & 41 Vict. c. 39, see next page.]

"nothing unless they are brought to the knowledged of the person "dealing with him (*q*).

In the case of *Fuentes* v. *Montis* (*r*), in 1868, the plaintiffs, merchants in Spain, sent some wine to one Ponte, their agent in London. Disputes having arisen, they ceased to employ him, and instructed him to deliver the wine over to Collier, another agent. Ponte refused to do so, and afterwards pledged the dock warrants for the wine, which had been made out in his own name, with the defendants. The question was whether this pledge was a good one against the plaintiffs. They contended that Ponte at the date of the pledge was neither an agent nor intrusted with the documents of title. And of this opinion was the Court of Common Pleas, and the judgment was affirmed in the Exchequer Chamber on the ground that a person who is to create a valid pledge of his principal's goods must be an agent who is intrusted at the time of effecting the pledge.

But now by the second section of the Factors Amendment Act of 1877, 40 & 41 Vict. c. 39, "Where any agent or person has been "intrusted with and continues in the possession of any goods, or documents of title to goods, within *the meaning of the [*435] "principal Acts as amended by this Act, any revocation of his in-"strument or agency shall not prejudice or affect the title or rights "of any other person who, without notice of such revocation, pur-"chases such goods or makes advances upon the faith or security of "such goods or documents."

In *Heyman* v. *Flewker* (*s*), in 1863, Willes, J., said: "The term "'agent' does not include a mere servant or caretaker, or one who "has possession of goods for carriage, safe custody, or otherwise, "as an independent contracting party, but only persons whose em-"ployment corresponds to that of some known kind of commercial "agent like that class (factors) from which the Act has taken its "name."

In *Vickers* v. *Hertz* (*t*), in 1871, Vickers ordered 800 tons of iron from the Carron Co., who held them at his disposal. Vickers employed Campbell Bros., of Glasgow, to sell the iron for him, and sent them an order in the following terms:—"To the Carron Co., please deliver to Messrs. Campbell Bros." Campbell Bros. by means of that order induced Hertz to make them an advance on the security of the iron, Campbell Bros. then absconded. The House of Lords considered that this case came strictly within 5 & 6 Vict. c. 39, s. 1, and that Campbell Bros. were agents intrusted with documents of title.

(*q*) *Vaughan* v. *Moffat*, 38 L. J. Ch. 144, in 1868.

(*r*) *Fuentes* v. *Montis*, L. R. 3 C. P. 268; L. R. 4 C. P. 93; 37 L. J. C. P. 137; 38 L. J. C. P. 95.

(*s*) *Heyman* v. *Flewker*, 13 C. B. N. S. 519; 32 L. J. C. P. 132. See also the observations of Willes, J., in *Fuentes* v. *Montis*, L. R. 3 C. P. 278; 37 L. J. C. P. 141, and *ante*, p. 431, n.

(*t*) *Vickers* v. *Hertz*, L. R. 2 Sc. App. 113.

In the case of *Cole* v. *North-Western Bank* (*u*), in 1875, Slee, of Liverpool, was both a warehouse-keeper, and a broker of sheeps' wool, but not of goats' wool. The plaintiffs had deposited both sheep and goats' wool in Slee's warehouse, and the course of dealing between the parties was for Slee always to await instructions as to the sale of the sheeps' wool, and to act only on receipt of specific instructions received from time to time. Slee never sold goats' wool. Slee pledged both wools with the defendants for an advance [*436] of *7000*l.* No warrants or other documents of title were handed to the defendants, either at that time or subsequently. Slee then absconded. The Court decided that Slee was not a person 'intrusted' within the meaning of the Acts, and had no power to pledge, and that decision was affirmed in the Exchequer Chamber. Most of the cases decided on the Factors Acts were examined, and the objects of the Legislature in passing them were reviewed at some length in the judgments so as to make them of great value. Lord Coleridge, C.J., firstly referred to the case of *Monk* v. *Whittenbury* (*x*), in 1831, which was a case of sale, and therefore came under s. 4 of 6 Geo. 4, c. 94. In that case Cramp, who was a flour factor as well as a wharfinger, had received flour in his character of wharfinger, and, without any authority to part with it, had sold it. Lord Tenterden said: "The material question in this case is, "whether Cramp was or was not an agent intrusted with the goods "in respect of which the action is brought, within the meaning of "6 Geo. 4, c. 94, s. 4. It is difficult to say precisely what is meant "in this section by an 'agent intrusted with goods'; but we are "clearly of opinion that a wharfinger is not such a person. If a "wharfinger were so considered, it would be impossible to say that "a carter, a warehouseman, or a packer, was not." Lord Coleridge then continued:—"Now, supposing that 5 & 6 Vict. c. 39, had not "been passed, and we were dealing with 6 Geo. 4, c. 94, the facts "of that case are almost identical with those of the present. * * * "Slee filled the double character of woolbroker and warehouseman; "and the wools were deposited with him to hold as warehouse-"keeper, not as factor to sell, until he should receive specific in-"structions to do so. If the language of the present Factors Act "had been the same as that of the former Acts, that case would "have been exactly in point. But it is said the language of 5 & 6 "Vict. c. 39, is altered. No doubt, the words are altered: they are, "'any agent intrusted with the possession of goods, or of docu-[*437] "'ments of title to *goods' (*y*), whereas in 6 Geo. 4, c. 94, "s. 1, the words were, 'any person intrusted for the purpose of "consignment' 'or of sale with any goods,' &c. What then, do "these words mean? In the first place, are they to be limited at

(*u*) *Cole* v. *North-Western Bank*, 9 C. P. 470; 43 L. J. C. P. 194; 10 C. P. 354; 44 L. J. C. P. 233.

(*x*) *Monk* v. *Whittenbury*, 2 B. & Ad. 484.

(*y*) 5 & 6 Vict. c. 39, s. *ante*, p. 431.

"all? And, if so, does it signify whether the capacity in which "the agent receives the goods is one which clothes him with author-"ity to sell them?"

Lord Coleridge then continued:—"In *Baines* v. *Swainson* (*z*), "the Court of Queen's Bench, basing their judgment in some degree "upon *Wood* v. *Rowcliffe* (*a*), held that the question under 5 & 6 "Vict. c. 39, was very much the same as under 4 Geo. 4, c. 83, and "6 Geo. 4, c. 94, viz., what sort of agent the person intrusted was,— "whether he was intrusted for the purpose of sale, or a person "whose general business it was to receive consignments of goods "for sale, and receive the goods in that character. We arrive, "therefore, at the conclusion that a limitation is to be put upon the "words of the Act, which brings 5 & 6 Vict. c. 39, though its "words are not exactly the same, substantially to the same "point as regards the character of the agent to be intrusted, "and the capacity in which the goods are received by him. The "result is, that, to bind his principals by a sale or pledge, the agent "must have been intrusted with the goods for the purpose of sale, "or he must be a person who is ordinarily intrusted to sell such "goods, and must have made the sale or the pledge in the course "of his ordinary business, in pursuance of the authority so con-"ferred upon him (*b*).

The judgment was affirmed in the Exchequer Chamber.

In the case of the *City Bank* v. *Barrow* (*c*), Lord Blackburn said: "The decision in *Cole* v. *North-Western Bank* (*d*), comes to "this: that an agent who can pledge or sell must *be an [*438] "agent of that class, which, like factors, have a business, which, "when carried to its legitimate result, would probably end in sell-"ing or in receiving payment for goods. * * * If such a person "is 'intrusted' and is intrusted in that capacity, then in the absence "of bad faith on the part of the pledgee, the pledge is good."

The case of *Johnson* v. *Credit Lyonnais Co.* (*e*), in 1877, resembled *Cole* v. *North-Western Bank* (*f*); Hoffman was a tobacco broker and importer. His ordinary course of business, was when tobacco arrived from abroad consigned to him, to have it placed in bonded warehouses in his name, and obtain dock warrants for it, he then, by his traveller, sold it to merchants, and agreed with them to clear it out of bond when required, they, from time to time as they required tobacco, sending him the amount of duty and dock dues payable in respect of the portion to be cleared. In this instance

(*z*) *Baines* v. *Swainson*, 4 B. & S. 282; 32 L. J. Q. B. 281.
(*a*) *Wood* v. *Rowcliffe*, 6 Hare, 183.
(*b*) *Kingsford* v. *Merry*, 11 Ex. 577; 1 H. & N. 503.
(*c*) *City Bank* v. *Barrow*, 5 App. Ca. 678, in 1880.
(*d*) *Cole* v. *N.-W. Bank*, L. R. 9 C. P. 470; 43 L. J. C. P. 194; L. R. 10 C. P. 354; 44 L. J. C. P. 233.
(*e*) *Johnson* v. *Credit Lyonnais Co.*, 2 C. P. D. 224; 3 C. P. D. 32; 47 L. J. C. P. 241.
(*f*) *Cole* v. *N.-W. Bank*, 9 C. P. 470; 10 C. P. 354; 43 L. J. C. P. 194; 44 L. J. C. P. 233.

he had sold tobacco to the plaintiff; the tobacco remained in bond in Hoffman's name, which it appeared was a common but not an invariable practice in the tobacco trade, the dock warrants were left in Hoffman's hands and the purchaser, the plaintiff, took no steps to have himself entered in the dock company's books as owner. After the sale, Hoffman fraudulently pledged the tobacco, and handed the dock warrants to the defendants, who had their names entered in the books of the dock company as owners of the tobacco. Hoffman absconded. The principal question was whether the case came within the Factors Acts, and there was a subsidiary one, whether the plaintiff, by leaving the goods and documents in Hoffman's possession, had clothed him with an apparent authority to pledge the goods, and by his negligence disentitled himself to sue. On the first point Cockburn, C.J., said: "Hoffman was not 'in-"trusted' with these goods, or with the documents of title relat-[*439] "ing to them, as agent to sell or consign, *or indeed as "agent in any sense, but stood only in the position of a paid ven-"dor remaining in possession of the thing sold till it suited the "convenience of the buyer to accept delivery." But the law on this subject is now altered by the Act of 1877, 40 & 41 Vict. c. 39, s. 3, which in effect says (*g*) that where goods have been sold, and the vendor continues in possession of the documents of title, any sale or pledge by him shall be as valid as if such vendor had been an agent intrusted by the vendee. The remarks of Cockburn, C.J., on the second point will be found later on (*h*).]

In the first edition of Smith's Mercantile Law, p. 334, it is suggested, speaking of s. 2 of the 6 Geo. 4, c. 94, that "It seems to "follow, that the negotiation of any of the instruments named in "the Act will (subject to the provisions thereof) defeat the vendors' "rights to stop in transitu." As far as regards bills of lading, the statute, if it bore this construction, would be nearly inoperative, as the negotiation of the bill of lading would, independently of the statute, have defeated the vendor's rights; but if the statute gives the same effect to the negotation of other documents of title, it produces an important change in the law. Even in the case of a bill of lading, it might change the effect of an indorsement after the goods were stopped.

[But now the fifth section of the Factors Act of 1877 (*i*) places the indorsement of any document of title (*k*) for the purposes of

(*g*) *Ante*, p. 432.
(*h*) *Post*, p. 441.
(*i*) 40 & 41 Vict. c. 39, s. 5.
(*k*) [A document of title is defined by s. 4 of 5 & 6 Vict. c. 39, to be "any "bill of lading, India warrant, dock warrant, warehouse keeper's certificate, "warrant or order for the delivery of goods or any other document used in the "ordinary course of business as proof of the possession or control of goods, or "authorizing or purporting to authorize either by indorsement or delivery, the "possessor of such document to transfer or receive goods thereby presented, "shall be deemed and taken to be a document of title within the meaning of "this Act."]

defeating the vendor's rights on the same footing as the indorsement of a bill of lading. It is enacted by that section that "Where any "document of title of goods has been lawfully indorsed or other-"wise transferred to any person as *a vendee or owner of [*440] "the goods, and such person transfers such document by indorse-"ment (or by delivery where the document is by custom or by its "express terms transferrable by delivery, or makes the goods deliver-"able to the bearer), to a person who takes the same *bonâ fide* "and for valuable consideration, the last mentioned transfer shall "have the same effect for defeating any vendor's lien or right of "stoppage in transitu as the transfer of a bill of lading has for de-"feating the right of stoppage in transitu."

The case of *Sheppard* v. *Union Bank of London* (*l*), in 1862, was decided on the second section of 5 & 6 Vict. c. 39, which gives a pledgee the same interest in goods or document of title taken in exchange as he had in those which were the subject of the original contract. There John Linnett got the goods in question from the plaintiff by a fraud, and deposited them with the defendants as a substituted security for other goods on which advances had been made by them to Sidney Linnett at John Linnett's request. The transaction was *bonâ fide* as far as the defendants were concerned. It was heard on demurrer on three grounds :—1st. That Linnett got them from the plaintiff by a fraud. 2nd. That they were not delivered by Linnett to the defendant in the ordinary course of business. 3rd. That the goods which were originally pledged did not belong to John Linnett, and were not deposited by him. The Court held that John Linnett's fraud did not alter the case, that it was not necessary that the deposit should have been made in the ordinary course of business, or that the first deposited goods should have belonged to him (*m*).

In *Macnee* v. *Gorst* (*n*), in 1867, where a factor, having bills of lading of his principal's goods in his hands, pledged them with a third person, on the understanding that the third person would retire a bill of exchange which he held, and which had been accepted by the factor, V.-C. Wood held *that this was a pledge for [*441] an antecedent debt, and therefore came within sec. 3 of 5 & 6 Vict. c. 39 (*o*), and was not good against the principal.

In *Portalis* v. *Tetley* (*p*), in 1867, V.-C. Wood held that a factor who had made a valid pledge for an amount less than the value of

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(*l*) *Sheppard* v. *Union Bank of London*, 7 H. & N. 661 ; 31 L.J. Ex. 154.

(*m*) See *Bonzi* v. *Stewart*, in 1842, 4 M. & Gr. 295.

(*n*) *Macnee* v. *Gorst*, L. R. 4 Eq. 315 ; *Jewan* v. *Whitworth*, L. R. 2 Eq. 692 ; 36 L. J. Ch. 127, in 1866 ; *Kaltenbach* v. *Lewis*, in 1883, 24 Ch. D. 54 ; 51 L. J. 881, reversed in the House of Lords.

(*o*) [This section states in effect that the Act shall not be construed to protect any lien or pledge in respect of any antecedent debt owing from any agent to any person with or to whom such lien or pledge shall be given.]

(*p*) *Portalis* v. *Tetley*, L. R. 5 Eq. 140; 37 L. J. Ch. 139.

the goods, might make a further pledge for the balance of their value.

In *Stevens* v. *Biller* (*q*), in 1883, it was argued unsuccessfully that a factor who had received special instructions as to the price and manner of selling, had ceased to be a factor, and had become a mere agent (*r*).

It has been argued that where a vendor has negligently allowed a person to remain in the possession of goods or documents, and this person has fraudulently sold or pledged them, the vendor has thereby clothed that person with an apparent authority to deal with the goods, and so disentitled himself to set up his title against a *bonâ fide* purchaser for value or pledgee. Lord Ellenborough, C.J., in *Pickering* v. *Busk* (*s*), in 1812, said:—"If a person au-"thorise another to assume the apparent right of disposing of "property in the ordinary course of trade, it must be presumed "that the apparent authority is the real authority. I cannot sub-"scribe to the doctrine that a broker's engagements are necessa-"rily and in all cases limited to his actual authority, the reality of "which is afterwards to be tried by the fact. It is clear that he "may bind his principal within the limits of the authority with "which he has been apparently clothed by his principal in respect "of the subject-matter; and there would be no safety in mercantile "transactions if he could not."

[*442] *And in *Johnson* v. *Credit Lyonnais Co.* (*t*), the facts of which are set out on page 438, Cockburn, C.J., said, "That Hoffman having "thus, by being left in undisturbed possession of the goods and "the indicia of ownership—there having been nothing to raise a "doubt as to the latter, or any means open to the defendants to as-"certain the fact—been enabled to defraud one of two innocent "parties, when the question arises as to which of them the loss "should fall upon, in reason and justice the loss ought to fall on "him who might have prevented, and as a matter of common prud-"ence ought to have prevented, the possibility of the fraud, is what "I cannot bring myself to doubt. * * * Sitting here in a "Court of Appeal, I feel myself at liberty to say that the authorities "fail to satisfy me that at common law the leaving by a vendee goods "bought, or the documents of title in the hands of the vendor, till "it suited the convenience of the former to take possession of them, "would, on a fraudulent sale or pledge by the party so possessed, "divest the owner of his property, or estop him from asserting his "right to it. If this had been so, there would have been, as it "seems to me, no necessity for giving effect by statute to the un-

(*q*) *Stevens* v. *Biller*, 25 Ch. D. 31.

(*r*) For further information on the Factors Acts, the reader is referred to a clear and exhaustive treaties on the subject by Mr. Hugh Fenwick Boyd, and Mr. Arthur Beilby Pearson.

(*s*) *Pickering* v. *Busk*, 15 East, 43.

(*t*) *Johnson* v. *Credit Lyonnais Co.*, 3 C. P. D. 36; 47 L. J. C. P. 245.

"authorised sale of goods by a factor. The doctrine established in "*Pickard* v. *Sears* (*u*) and *Freeman* v. *Cooke* (*x*), and the subse-"quent cases which have proceeded on the same principle, carry "the case no further. In all cases decided on this principle, in "order that a party shall be estopped from denying his assent to "an act prejudicial to his rights, and which he might have resisted, "but has suffered to be done, it is essential that knowledge of the "thing done shall be brought home to him. Here it is clear that "the plaintiff had no knowledge whatever of the advances obtained "by Hoffman on the security of the goods, or even of the existence "of the dock warrants which made Hoffman appear to be the "owner. It would be to carry *this doctrine much too far [*443] "to apply it where advantage has been taken of a man's remissness "in looking after his own interests to invade or encroach upon his "rights, in the absence of knowledge on his part of the thing done, "from which his assent to it could reasonably be implied. The de-"fence, founded on the allegation of negligence, remains to be con-"sidered, that the plaintiff, in omitting to have the goods trans-"ferred to his own name, and to have the dock warrants delivered "over to him, was wanting in common prudence, in other words, "was guilty of negligence. I cannot bring myself to doubt, and I "am strongly confirmed in this view by the passing of the recent "statute (*y*), as the legislature must have proceeded on the view "that there is default in the owner in such a case. * * * But "whether this negligence of the plaintiff will, under the circum-"stances, give to the defendants any ground of complaint which can "be enforced in point of law, is a very different question. Negli-"gence to afford a ground of action to one who has suffered from it "must have reference to some duty which the party guilty of the "negligence owed to him. The law is, in my opinion, correctly "stated by Blackburn, J., in *Swan* v. *North British Australian Co.* (*z*), where, after referring to what was said by Parke, B., in *Free-"man* v. *Cooke* (*a*), namely that negligence, to have the effect of "estopping the party, must be the neglect of some duty cast upon "the person guilty of it, he goes on to say:—'This, I apprehend, is "'a true and sound principle. A person who does not look up his "'goods, which are consequently stolen, may be said to be negli-"'gent as regards himself; but, inasmuch, as he neglects no duty "'which the law casts upon him, he is not in consequence estopped "'from denying the title of those who may have, however inno-"'cently, purchased those goods from the thief, except in market "'overt.' The same principle would obviously apply to the case of *"goods fraudulently sold or pledged by a person left in [*444]

(*u*) *Pickard* v. *Sears*, 6 A. & E. 469.
(*x*) *Freeman* v. *Cook*, 2 Ex. 654; 18 L. J. Ex. 114.
(*y*) Probably 40 & 41 Vict. c. 39, s. 3.
(*z*) *Swan* v. *North British Australian Co.*, 2 H. & C. 175; 32 L. J. Ex. 273.
(*a*) *Freeman* v. *Cooke*, 2 Ex. 654; 18 L. J. Ex. 114.

"possession of them. The rule thus laid down is applicable here. "The plaintiff may have been negligent, and his negligence may have "brought on the defendants the loss of the money they have advanced. "But the plaintiff owed no duty to the defendants—at least, no "duty which the law can recognise—either as individuals or as "members of the general public. This being so, I am of opinion "that the negligence of the plaintiff neither estops him from claim-"ing the goods in question from the defendants, nor gives the latter "a counterclaim for the money which they have advanced to Hoff-"man on the security of the goods" (*b*).]

(*b*) See also the remarks of Coleridge, C.J., in *Cole* v. *North-Western Bank*, 9 C. P. 488; 43 L. J. C. P. 198.

*CHAPTER III. [*445]

ON THE EXTENT OF THE VENDOR'S RIGHTS WHILST IN POSSESSION, AND OF THE RIGHT TO RESCIND THE CONTRACT.

THE next subject of discussion, viz., the extent of the unpaid vendor's rights whilst he is in possession of the goods, is one on which the law is more unsettled than any person not practically acquainted with the subject could anticipate. The vendor has a right in the goods whilst he retains possession, and the right comes into operation when the purchaser is solvent, but in default. It also exists when the purchaser is insolvent whether the purchaser be in default or not, and it exists when the vendor has resumed possession by a stoppage in transitu. The position of the unpaid vendor in the three cases is not precisely the same, and though it is probable that his rights in each are of a similar nature, it is not to be assumed that they are the same, so that it must not be taken for granted that a decision as to the vendor's rights in one of the three cases is an authority equally applicable to the vendor's rights in the other two.

The decided cases seem to establish, that in all three positions the right exceeds a mere lien, [which would only entitle the vendor to retain the goods until he had been paid for them, and would not enable him to confer any title on a third person, either by way of sale or pledge (*a*),] that is to say, [the vendor's right] interferes not only with the purchaser's right of possession, but also with his right of property; but that the vendor's right does not in any one of the cases amount to a right to resume a complete right of property, so as to devest totally the purchaser's right of property; or in *other words, that the vendor cannot treat the contract of [*446] sale as rescinded, so as to resume his property as if the sale had never been made.

The precise extent of the vendor's right between those limits is very much a matter of conjecture. It would seem that, viewing it as a practical question, the most convenient doctrine would be to consider the vendor as entitled in all cases to hold the goods as a security for the price, with a power of resale to be exercised, in case the delay of payment was unreasonably long, in such a manner as might be fair and reasonable under all the circumstances. If the resale was conducted by the vendor in a fair and reasonable manner, the original purchaser who was in default would have no right to complain; if the resale produced a sum greater than the unpaid portion of the price, the purchaser would be entitled to the surplus; if there was a deficiency, he would still remain indebted to the ven-

(*a*) *Thames Iron Works Co.* v. *Patent Derrick Co.*, 1 John. & H. 93; 29 L. J. Ch. 714; *Scott* v. *Newington*, 1 Moo. & Rob. 252.

dor for that amount. If the purchaser, previously to the resale, tendered all that was due, he would be entitled to consider the resale as altogether tortious, and to maintain trover against the vendor (*b*); but if he did not make that tender, his remedy for an abuse of the power of sale would be by an action for that abuse, and not by an action of trover.

The establishment of this principle would do very little violence to the decided cases, but it is not to be found laid down in any of them. Probably the question will come ultimately to be decided by what special juries may declare to be the mercantile custom, for such cases are too common not to have led to a custom of some sort. At present the decisions do not seem to authorise a more definite statement of the law, than that a default on the part of the purchaser does not authorise the vendor to consider the contract rescinded; and that a resale by the vendor whilst the purchaser is in default does not entitle the purchaser to recover more than the damage he may sustain by such a resale.

[*447] *The unpaid vendor's rights cannot be attributed to the effect of the agreement of the parties in the contract of sale.*

It is true, that as the purchaser's rights in the goods sold are acquired entirely under the contract of sale, he can claim no right greater than he has bargained for, so that his rights are subject to such limitations as may have been imposed by the contract. But the unpaid vendor has rights of a peculiar nature, which are conferred by the law, though they are not such, as on the ordinary rules of construction, would be impliedly reserved by the contract, and though one of them at least (stoppage in transitu) is of a naturo that could scarcely be created by the agreement of the parties.

The establishment of this position is a step of some importance in ascertaining the principles on which the nature and extent of the rights depend, and it may be as well in the first place to consider at more length what the extent of the vendor's rights would be if they were neither more nor less then those intended to be reserved to the vendor by the agreement of the parties to the contract of sale and to consider later on what are those rights of the vendor which are not reserved to him by the contract.

In considering this, we must of course apply to the contract of sale the ordinary legal rules of construction applicable to contracts in which each of the contracting parties undertakes to do something, sometimes called synallagmatic contracts.

In construing contracts of this nature, it is always a question of importance to ascertain to what extent the undertaking of the one party is dependent on the due performance of the contract of the other. The parties may intend, that the one side shall literally and

(*b*) *Walter* v. *Smith*, 5 B. & Ald. 439.

completely fulfil some part of the contract, before the other side shall be bound to do any thing; and if they do so agree, it is right that they should be bound by their agreement. The consequence may be, that the party who has failed in the literal performance of his part of the contract may have incurred much expense, *and [*448] conferred much benefit on the other side by a partial performance, without receiving any recompense; but if such was the intention of the parties when entering into the agreement, it is to be supposed that they took it into consideration in calculating the amount of the recompense thus made contingent. But the parties may not intend this, but that each party shall perform his part of the contract independently, so that a breach of contract by the one party, shall not absolve the other from the obligation he has come under on his part.

Now, in a contract of bargain and sale, the vendor agrees to transfer the property and the possession of the goods to the purchaser, who agrees to accept and pay for them, and what at present we propose to ask is, how far on the ordinary principles of construction, the parties must be considered to intend to make the passing of the rights of property and possession dependent upon the punctual payment of the price.

In general, the expressed intention of the parties to a contract decides whether the obligation on one party to perform some part of his contract, is dependent on the due performance of some part of the contract of the other side, or whether the parties are bound independently, each having a remedy by action for any breach of contract on the other side, but not being absolved from his own engagement by such a breach. But though the intention of the parties is the thing to be ascertained, yet, where the whole agreement is such as to show that the non-performance of a part of the contract, may still leave the other side a benefit from the performance of the rest of the contract, the parties must express their intention very clearly, if they mean the default of the party in the performance of that part, to operate as a forfeiture of all recompense for the benefit that may be conferred by the performance of the rest of the contract. The penalty may be so disproportioned to the default, that though the parties may legally enter into such an agreement, it is too unreasonable not to require very clear proof. The whole law on the subject may be found contained in the *notes to [*449] *Pordage* v. *Cole* (*c*), and *Cutter* v. *Powell* (*d*), and to those the reader is referred.

[Tindal, C.J., said that the question whether covenants are to be held as dependent or independent of each other, is to be determined by the intention and meaning of the parties as it appears by the instrument and by the application of common sense to each particucar case; to which intention, when once discovered, all technical forms of expression must give way.]

(*c*) *Pordage* v. *Cole*, 1 Will. Saund. 548.
(*d*) *Cutter* v. *Powell*, 2 Sm. L. Ca. 1.

The rule, that mutual agreements shall not be taken to be dependent [except where the terms of the contract show an intention that they are to be, and] except where the nonfulfilment of the one goes to the whole consideration for the other, is material in considering how far the parties to a contract of sale can be considered as intending to reserve to the vendor a right to resume the property in the things sold on default of payment.

In an agreement amounting to a bargain and sale, a failure in the punctual payment of the price, never can literally go to the whole consideration for the sale. The property is transferred from the moment of the bargain, and with the property the risk. The purchaser therefore, during the interval between the completion of the bargain, and the time when he becomes in default, is liable to the risk of loss of the goods. In some cases, the value of this liability may be very large, in others very small, but in every case it must be of some value. In most cases of stoppage in transitu, the goods are stopped at the end of a sea voyage, during which they have been at the risk of the insolvent, and in those cases the risk has evidently been considerable; and *Rugg* v. *Minett* (*e*) is a case which shews that even on land, the transfer of the property a few minutes earlier or later may be of great pecuniary value. If the parties by the terms of their agreement, shew an intention to make [*450] the punctual *payment of the price of the essence of the contract they may do so, but it seems that in such cases the agreement does not amount to a bargain and sale (*f*), and that consequently, the property and risk remain with the vendor.

It is perfectly obvious, that in addition to this liability to the risk of loss which must exist in every case of a bargain and sale, the buyer may, in particular cases, have undertaken many things besides the payment of the price, and, consequently, that the buyer, though in default as to payment, may have conferred benefit on the vendor under the contract.

It certainly would be a very rude sort of jurisprudence, which made a delay in payment of the price, amount in all cases to a complete devestment of the purchaser's right of property in the goods, so as to destroy his right in future, under any circumstances, to obtain a benefit under the contract of sale. The vendor sustains some damage from the default in making payment, and he is entitled to compensation from the purchaser for that damage. But if the default operates as a forfeiture of the purchaser's right of property, there is no necessary proportion between the damage and the compensation. The vendor would benefit by being entitled to resume the property with which he had parted, but there are conceivable cases in which this benefit might be out of all proportion greater than the damage he could have sustained by the pur-

(*e*) *Rugg* v. *Minett*, 11 East, 210, *ante*, p. 177.
(*f*) *Ante*, p. 201.

chaser's default. And the loss sustained by the purchaser, by rendering his partial performance useless to him, might be an outrageously severe penalty for his default.

It seems, therefore, not too much to assert, that a default in making punctual payment cannot be considered as going to the root of a whole contract of bargain and sale [or, in other words, does not amount to the whole consideration for the vendor's undertaking], and, consequently, that on the ordinary rule of construction, [the mutual agreements are *not to be taken to be dependent and [*451] therefore] the parties cannot be considered as agreeing to give the vendor a right to resume any property in the goods bargained and sold. Any right which he has to interfere with the property vested in the bargainee, must be founded on something else than the intention of the parties to the agreement.

The vendor's right to interfere with the purchaser's right of possession is somewhat different.

The rules laid down by Williams, Serjt., in his note to *Pordage* v. *Cole* (*g*), will be found, on examination to be founded in strong sense. "1st. If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act before performance. * * * But—2. When a day is appointed for the payment of money, &c., and the day is to happen after the thing which is the consideration of the money, &c., is to be performed, no action can be maintained for the money, &c., before performance. * * * 5. Where two acts are to be done at the same time. * * * Neither party can maintain an action without shewing performance of, or an offer to perform his part, though it is not certain which of them is obliged to perform the first act, and this particularly applies to all cases of sale."

By applying these rules to the construction of a contract of sale, it appears at once, that where by the terms of the contract there is nothing said about the time of delivery of possession, or payment of the price, the intention of the parties must be taken to be, that these are to be concurrent acts, and, consequently, that the intention of the parties is not to give the purchaser the right of possession until he has paid, or tendered the price. And this is still more clearly the case, where it is stipulated that the price shall be paid in advance. In each of those cases, therefore, it must be taken, *that the parties intend to give the vendor a right to retain [*452] possession till the price is paid, or in other words, a right of lien for the price.

But when express credit is given in the contract of sale, the case is different. There, by the terms of the agreement, the right of

(*g*) *Pordage* v. *Cole*, 1 Will. Saund. 551.

possession is to precede the payment of the price, and, therefore, on the ordinary principles of construction, the intention of the parties must be taken to be, to give the purchaser an absolute and independent right to the possession. In such a case, therefore, the parties do not intend to give the vendor any right of lien; and the insolvency of the purchaser would not, on ordinary rules, make any difference, for in general, the insolvency of a contractor does not release the other party from the contract (*h*).

The vendor's right's, therefore, if they depended on the agreement of the parties merely, would be very limited. He would in no case have more than a lien in the strictest sense of the word, a mere right of retainer; and he would not have even a lien, when express credit had been given, though the purchaser might be insolvent, or even a bankrupt, and he would have no right whatever to stop the goods in transitu. There is some difficulty in saying what the vendor's rights are, but there is none in saying, that they are more extensive than these. It follows, therefore, that we must seek for their foundation in something else than the contract of the parties.

[We may now proceed to consider what the vendor's rights are in additon to such as are intended to be reserved to him by the contract of sale.].

There seem to be no traces of these rights in the earlier law books. The only case that has been found bearing on the subject, is that in the 17 Ed. 4, 1, 2, already translated (*i*). In that case, decided in the year 1478, two out of three Judges seem to have thought, that the property in goods concerning which there was a contract of sale, could not be intended to be transferred before pay-[453] ment, because if it did *pass, the vendor could have no right inconsistent with the purchaser's right of property, [and would be unfairly placed in the position illustrated by] *Choke*, J., in clear and pointed language. "Do you think it is my (the vendor's) in-"tent that you shall have the horse without paying the money? "I say no, and I may sell him to another in the mean time, and "you shall have no remedy against me, for otherwise, I shall be "compelled to keep my horse for ever against my will, and you "shall take him when you please, which is contrary to reason." He did not perceive any intermediate state of things between an indefeasible vesting of the right of property in the purchaser, with the consequence, which, as he truly says, is contrary to reason, and an absolute remaining of the property in the vendor till payment. And Brian, C.J., who held that the property was in the purchaser, but that the vendor had a right to retain the goods till payment, does not seem to have thought that the vendor had more than a mere lien. He likens the case to that of a bailee, and takes no notice of Choke's very forcible remark, that if the vendor was bound

(*h*) *Gibson* v. *Carruthers*, 8 M. & W. 321; 11 L. J. Ex. 145.
(*i*) *Ante*, p. 261.

to keep the goods for ever, it was unreasonable. This case is repeatedly cited in the different digests, but there seems to be no independent authority till the case of *Langfort* v. *Tiler* (*k*), in 1705. It seems impossible to suppose that there should have been no litigation on such a subject, and the most probable conjecture is, that amongst the country people, sales were all for ready money, and in mercantile cases, the disputes were decided in the staple, or at least according to the Law Merchant. If this be so, the vendor's rights whilst in possession, like his analogous right of stoppage in transitu, owe their origin neither to common law nor to equity, but to the custom of merchants.

The case of *Langfort* v. *Tiler* (*k*), is reported in two different reporters, both agreeing as to what Lord Holt said, but in other respects exactly contradicting each other. In Salkeld, it is said that the plaintiff sold the defendant *some tea, that she took away [*454] part, and paid part of the price of the residue. In modern reports it is said that the plaintiff was the purchaser of the tea, not the vendor. Neither report says what was the decision, but both state in nearly the same words, that Holt, C.J., ruled, "that after earnest "given, the vendor cannot sell the goods to another without a default "in the vendee, and therefore, if the vendee does not come and pay "and take the goods, the vendor ought to go and request him; and "then if he does not come and pay and take away the goods in con-"venient time, the agreement is dissolved, and he is at liberty to "sell them to any other person." There is nothing in the context to shew in what sense Holt used the word "dissolved." It is not a word having like "rescinded" a technical and ascertained sense, but perhaps it was used as equivalent to that word. At all events, it is clear that Lord Holt thought the property was by the bargain in the purchaser, and yet that the vendor was not bound to keep the property for ever.

The present state of the law however, must be looked for in the more recent decisions, and as has been already said (*l*), they seem to establish that the unpaid vendor's right exceeds a mere lien, and does not amount to a right to resume the absolute property.

The vendor's rights in all cases exceed a lien. In cases of insolvency they come into operation, although there has been express credit. Perhaps even when the purchaser is not insolvent the vendor's right's revive, if he is suffered to retain possession till after the credit has expired.

The authorities for these propositions may most conveniently be taken here.

The two first were the very points decided in two following cele-

(*k*) *Langfort* v. *Tiler*, 1 Salk. 113; 6 Mod. 162.
(*l*) *Ante*, p. 445.

brated cases, *Bloxam* v. *Sanders* (*m*), and *Bloxam* v. *Morley* (*n*), in 1825.

[*445] *In *Bloxam* v. *Sanders*, Saxby had purchased of Sanders and Co. a quantity of hops. There seems to have been no credit given; no part of the price was paid, and the hops were not delivered. Sanders and Co. gave Saxby notice that if he did not pay for the hops they would resell them, holding him liable for the difference in price. Then Saxby, before any resale, became bankrupt, and Sanders and Co. did resell the goods. Saxby's assignees brought trover against them for so doing. In *Bloxam* v. *Morley*, Saxby had purchased hops from Morley on credit, but the credit expired before he became a bankrupt, and before the resale. He had paid Morley a considerable part of the price, 700*l.*, and Morley did not return or offer to return any part of this sum to Saxby or his assignees before the resale and Saxby's assignees brought trover against him; in other respects the case was identical with *Bloxam* v. *Sanders* (*o*). The Court of King's Bench decided both cases in favour of the defendants. The judgments seem carefully framed, so as to avoid expressing an opinion as to the positive rightfulness of the resale; but they decided, that though the property had by the sale vested in the purchaser, and in Morley's case the right of possession too [during the credit], yet, said Bayley, J., in *Bloxam* v. *Sanders* (*o*), "the right of possession is "not absolute, it is liable to be defeated if he becomes insolvent "before he obtains possession. Whether default in payment when "the credit expires will destroy his right of possession (if he has "not before that time obtained actual possession), and put him in "the same position as if there had been no bargain for credit, it is "not now necessary to inquire, because this is a case of insolvency "and in case of insolvency the point seems to be perfectly clear." In *Bloxam* v. *Morley* (*p*) he says, "This was not an action for "damages for selling without returning the 700*l.*, or for selling "when, according to his contracts with Saxby, he had no right to [*456] "sell, but it was an action of trover, assuming that the *prop-"erty was in the assignees of Saxby, and that the sale by the de-"fendant vested also the right of possesssion in them. * * * It "seems to us, however, upon the same principles which prevented "the plaintiffs from maintaining the action against Sanders, they "cannot maintain the present action."

These cases are therefore, direct authorities for the two propositions, that in cases of insolvency before the actual delivery, the vendor's right revives after the credit has expired, and that in cases of insolvency at least it exceeds a lien.

(*m*) *Bloxam* v. *Sanders*, 4 B. & C. 941.
(*n*) *Bloxam* v. *Morley*, 4 B. & C. 951.
(*o*) *Bloxam* v. *Sanders*, 4 B. & C. 948.
(*p*) *Bloxam* v. *Morley*, 4 B. & C. 952.

The case of *Dixon* v. *Yates* (*q*), in 1833, is also a direct authority that in cases of insolvency the vendor's right revives even after a subsale made whilst the credit existed, and the purchaser was solvent. In that case there was no occasion to inquire what the extent of the vendor's right was, nor whether it exceeded a lien or not.

In *Wilmshurst* v. *Bowker* (*r*), in 1839, the point arose before the Common Pleas on the record. The bargain was, that possession was to be delivered on receipt of a banker's draft. The purchaser, who was *not* insolvent, did not punctually deliver the banker's draft, and the vendor instantly resold the goods. The purchasers brought trover, and by a new assignment confined their complaint to the resale. The Court of Common Pleas decided on demurrer, that whether this resale was justifiable or not, the plaintiffs were not entitled to the possession of the goods, as they had not given the banker's draft (*s*), and therefore, said Tindal, C.J., "the plaintiffs, "according to the decision of the King's Bench in *Bloxam* v. *San-* "*ders* (*t*), with the facts of which case those of the present very "nearly agree, cannot maintain trover, however they might have "been able to have *brought a special action upon the case [*457] "against them for any damage sustained in consequence of the re- "sale, without waiting a reasonable time for the remitting of the "banker's draft; and this meets the justice of the case, for in such "an action they would recover only the damages actually sustained "in consequence of the resale, which might be very small, and not "as in an action of trover, the full value of the goods for which they "have not paid according to the terms of the contract." This was a decision that the vendor's right exceeds a mere lien whilst the purchaser is in default, though solvent.

And the same Court afterwards, in *Milgate* v. *Kebble* (*u*), in 1841, decided the same point. The vendor resold the goods, and the purchaser brought trover against him for so doing. The facts appeared to be, that the purchaser had, before the resale, paid a considerable portion of the price, but that he was in default in paying the remainder. The purchaser was solvent, and the jury found expressly, that the resale was unreasonable, [and gave a verdict for the plaintiff. But the defendant subsequently moved to nonsuit the plaintiff on the ground that his, the vendor's, right of possession had not been lost, and therefore the plaintiff was not entitled to maintain trover against him and was successful]. In this case the purchaser, at the time of the resale, was still in default, and had made no tender of the unpaid part of the price before the resale.

(*q*) *Dixon* v. *Yates*, 5 B. & Ad. 313, *ante*, p. 342.

(*r*) *Wilmshurst* v. *Bowker*, 5 N. C. 541.

(*s*) [But on appeal to the Exchequer Chamber, reported in 7 M. & G. 882, the Court held that the delivery of the banker's draft was not a condition precedent, see *ante*, p. 153.]

(*t*) *Bloxam* v. *Sanders*, 4 B. & C. 941.

(*u*) *Milgate* v. *Kebble*, 3 M. & G. 100, *post*, p. 463.

In *Martindale* v. *Smith* (*x*), in the same term, the Queen's Bench decided, that where the plaintiff being in default, *had* made a tender before the resale, trover would lie. The cases are perfectly consistent; *Milgate* v. *Kebble* (*u*), decided that the vendor's right exceeded a right of lien, and *interferred* with the purchaser's right of property; *Martindale* v. *Smith* (*x*), that it did not absolutely *supersede* his right of property.

[*458] *It is not too much to assume that the vendor's rights to retain arise under the same circumstances as his right to stop in transitu would arise, if the goods were put in motion. It would be rather an anomaly if the vendor, in order to raise his rights, was obliged to put the goods in motion, and then stop them again; and it seems always taken for granted, that these analogous right are coextensive, and that the vendor may justify a retention of the goods, under the same circumstances as would justify a stoppage of them.

[In *Valpy* v. *Oakeley* (*y*), the vendees accepted three bills against goods according to contract, they met the first bill at maturity, and became bankrupt after the time for the delivery for the goods had expired, but before the other two bills had reached maturity. The whole of the goods had not been delivered, and the vendee's assignees brought this action against the vendor for not delivering the residue, and recovered nominal damages. Lord Campbell, C.J., saying of the two outstanding bills, "While current they were payment, when dishonoured they were waste paper * * * and there "being no difference shown between the market price at the time of "default and the contract price, the vendees could have recovered "only nominal damages. No more therefore can the assignees."]

It has been twice ruled at Nisi Prius, once by Bayley, J., in *New* v. *Swain* (*z*), in 1828, and again by Littledale, J., in *Bunney* v. *Pointz* (*a*) in 1832, that where the owner of goods sells on credit, and the purchaser suffers him to retain possession till the credit has expired, the seller then acquires a right to retain them till the payment is made, although the purchaser, who is in default, does not ultimately prove insolvent. This point has never been decided by the Court *in banc*, and must be considered as doubtful. The [*459] expressions *used in the judgment of the King's Bench in *Bloxam* v. *Sanders* (*b*) certainly afford it some countenance (*c*).

Assuming, therefore, what seems pretty well established, that the vendor's rights exceed a lien, and are greater than can be attributed to the assent of the purchaser, under the contract of sale, the question arises, how much greater than a lien are they? And this is a

(*x*) *Martindale* v. *Smith*, 1 Q. B. 389, *post*, p. 469.
(*y*) *Valpy* v. *Oakeley*, 16 Q. B. 941; 20 L. J. Q. B. 381; *Griffiths* v. *Perry*, 1 E. & E. 680; 28 L. J. Q. B. 204.
(*z*) *New* v. *Swain*, 1 Dans. & Loyd, 193.
(*a*) *Bunney* v. *Pointz*, 4 B. & A. 568.
(*b*) *Bloxam* v. *Sanders*, 4 B. & C. 941, *ante*, p. 455.
(*c*) See also judgment of Parke, J., in *Dixon* v. *Yates*, 5 B. & Ad., p. 341.

question that, in the present state of the law, no one will venture to answer positively, but as has already been said, the better opinion seems to be, that in no case do they amount to a complete resumption of the right of property, or in other words to a right to rescind the contract of sale, but perhaps come nearer to the rights of a pawnee with a power of sale, than to any other common law rights. At all events it seems, that a resale by the vendor, whilst the purchaser continues in default, is not so wrongful as to authorize the purchaser to consider the contract rescinded, so as to entitle him to recover back any deposit of the price, or to resist paying any balance of it still due; nor yet so tortious as to destroy the vendor's right to retain, and so entitle the purchaser to sue in trover. [Since the above passage was written it has been repeatedly stated by judges that the vendor cannot rescind the contract except where it may be presumed from the conduct of the other party that he also intended to rescind the contract.]

Before entering (*d*) upon this subject, on which it will be proper to endeavour to collect all the authorities, it may be as well to clear the subject from one or two cases in which the purchaser's right of property may be completely devested, but by the operation of perfectly different rules of law.

First of all it is to be observed, that a vendor who has retained the possession of goods, and becomes a bankrupt, may come within the provisions of the bankrupt laws (*e*); as a reputed owner of the goods, having at the time of his *bankruptcy the possession [*460] of the goods by consent of the true owner, that is of the purchaser. *Knowles* v. *Horsfall* (*f*). In cases of this nature, it is quite immaterial whether the vendor had more or less legal interest in the goods; the question is, whether the purchaser suffered him to be reputed owner or not. It does not, therefore, belong to the present subject to treat on this class of cases.

Secondly, a sale transferring the property in goods, and not accompanied by a delivery of possession, may be void as against the vendor's creditors, because fraudulent, either at common law, or by the statute 13 Eliz. c. 5. It is not, however, a matter of law that a sale unaccompanied by delivery of possession, is void as against creditors, but only that the want of an open change of possession, as evidence, tends to shew that the sale was made with a fraudulent intention.

The law, and cases upon this subject, are collected in a note to *Twyne's* case, in *Smith's Leading Cases*, to which the reader is referred.

In *Martindale* v. *Booth* (*g*), in 1832, the King's Bench decided that a bill of sale by way of mortgage, was good as against an ex-

(*d*) *Post*, p. 462.
(*e*) See the 44th section of the Bankruptcy Act of 1883.
(*f*) *Knowles* v. *Horsfall*, 5 B. & A. 134.
(*g*) *Martindale* v. *Booth*, 3 B. & Ad. 498.

ecution creditor, although no possession was delivered, and Parke, J., said, that "the want of delivery was only evidence that the "transfer was colourable."

In *Eastwood* v. *Brown* (*h*), in 1825, where there was a sale of goods of which the vendor remained in possession, Abbott, C. J., held that it was not in itself a void sale as against an execution creditor, but left it to the jury to say on the whole case, whether it was an arrangement for the purpose of delaying, or defeating creditors, and the jury found in favour of the sale, and the summing up was not afterwards questioned.

These cases are authorities that the property is in the purchaser, [*461] against third persons as well as against the vendor. *But though the vendor has not the property in the goods, he may nevertheless, have power to sell them, so as to confer a good title on a subsequent purchaser. There is a dictum of Abbott, C. J., in *Knowles* v. *Horsfall* (*i*), to the effect that a vendor suffered to retain possession of the goods, is clothed by the purchaser with an apparent authority to deal with them as his own, and that consequently, a sale by him would bind the first purchaser. This may be somewhat doubtful, and is not in agreement with *Reeves* v. *Capper* (*k*), but this principle can only apply where the second purchaser bought *bonâ fide*, and without notice of the prior sale; when it does apply it must be immaterial whether the first purchaser has paid the full price or not, for the apparent authority given to a paid vendor, who is suffered to retain possession of the goods, is quite as extensive as that given to an unpaid vendor in similar circumstances. Such a question can hardly arise without a criminal fraud on the part of the vendor, and considerable negligence on the part of the purchaser.]

[The purchaser's rights may also be devested by the operation of the Factors Acts (*l*), and by a sale in market overt. The law on this subject will be found in Tudor's leading cases in Mercantile and Maritime Law, 2nd ed. 713 (*m*).

(*h*) *Eastwood* v. *Brown*, R. & M. 312.
(*i*) *Knowles* v. *Horsfall*, 5 B. & A. 140.
(*k*) *Reeves* v. *Capper*, 5 Bing. N. C. 136; 2 Jur. 1067; 6 Scott, 877.
(*l*) *Ante*, p. 426.
(*m*) [The positions of a purchaser for value, an execution creditor, and a trustee in bankruptcy, are not the same. A purchaser for value, if he had no notice of any equities affecting the property, takes his vendor's interest in the property unaffected by those equities. An execution creditor can only seize his debtor's interest (*n*); and, therefore, if there is any equity affecting the property, he can only seize it subject to that equity whether he had notice of it or not. But the execution creditor may seize property which the debtor has parted with by an assignment, which, although good between the debtor and the assignee, was made under such circumstances that the law declines to re-

(*n*) *Lanyon* v. *Toogood*, in 1844, 13 M. & W. 27; 13 L. J. Ex. 273; *Glasspoole* v. *Young*, in 1829, 9 B. & C. 696; *Nicolls* v. *Bastard*, 2 Cr. Mee & Ros. 759; *Manders* v. *Williams*, 4 Ex. 339; 18 L. J. Ex. 437.

*But to return to the question [how much the vendor's [*462] rights exceed a lien, or in other words] how far a vendor partially or totally unpaid, may, after the purchaser is in default or insolvent, confer a good title to the goods on a second purchaser who has notice of the prior purchase; and if he can confer such a good title, how far the act conferring it renders him liable to the original purchaser whose rights are thus devested, or to what extent that act affects the vendor's right to recover or retain the price due from the first purchaser.

In *Langfort* v. *Tyler* (*q*), in 1705, Holt, C. J., is reported to have ruled,—"That after earnest given, the vendor cannot sell the goods "to another without a default in the vendee, *and there- [*463] "fore, if the vendee does not come and pay and take the goods, the "vendor ought to go and request him, and then if he does not come "and pay, and take away the goods in convenient time, the agree- "ment is dissolved, and he is at liberty to sell them to any other "person."

This has been sometimes understood to be a ruling, that a resale under such circumstances was rightful, and operated as an election to rescind the contract.

If such were the effect of a resale, it would follow that the ven-

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cognize it as against the creditor. Such a contract may be regarded as void either according to the common law, or under 13 Eliz. c. 5, which enacted that all assignments made for the purpose of delaying, hindering, or defrauding creditors should be void. Whether an assignment was made for that purpose is a question of fact in every case, and such facts as that the transaction was a secret one, or made for a very small consideration, or that the vendor remained in possession after the sale, are strong evidence of fraud. But although remaining in possession is strong evidence, it is not conclusive. For example, in the case of a mortgage of chattels, where the nature of the transaction is, that the vendee shall only take possession on the happening of some future event. To stop this loophole for fraud, the Bills of Sale Acts have from time to time been passed, making all assignments, whether absolute or by way of mortgage, void, unless registered in the manner prescribed by the Acts. The law on this subject will be found in the *Twyne's* case in Smith's Leading Cases, vol. i. And so exacting is the law in these cases, that even if the execution creditor had at the time when the debt was contracted notice of the assignment, he is not affected by it, but is in the same position as if he had not had notice (*o*).

The rights of the trustee in bankruptcy over property which is in fact the property of the bankrupt, are much the same as those of the execution creditor —he takes it subject to all the equities affecting it, whether he had notice of them or not. But he has rights over property which is not in fact the property of the bankrupt, more extensive than those which the execution creditor has, for he may not only take property which the bankrupt has assigned by an assignment which the law will not recognize, but further, by the Bankruptcy Act he may take all goods in the possession of the bankrupt with the consent of the true owner, of which the bankrupt is the reputed owner (*p*).

(*o*) *Edwards* v. *Edwards*, in 1876, 2 Ch. D. 291; 45 L. J. Ch. 391.
(*p*) Bankruptcy Act of 1884, s. 44.
(*q*) *Langfort* v. *Tyler*, 1 Salk. 113, *ante*, p. 453.

dor must return any part of the consideration he had received (*r*). This might not always be possible, and in many cases would be very unjust. The purchaser would have taken his chance of the benefit of a rising market, or any other lucky event, and the vendor would bear the loss arising from an unlucky one. The circumstances in *Milgate* v. *Kebble* (*s*), in 1841, illustrate this better than any supposititious case could do. There the vendor sold his crop of fruit for 38*l.*, payable part by instalments, and part on delivery of the fruit. The purchaser paid 33*l.* and if fruit had risen in value, or the crop had proved very good, he would no doubt have paid the remaining 5*l.*, but he did not pay it, and the vendor resold the whole of the fruit for 6*l.* The purchaser brought trover against him and the jury found that the resale was unreasonably speedy, and that the purchaser's damage in consequence was 5*l.* Surely it would be very harsh law to say, that in consequence of this resale damaging the purchaser to the extent of 5*l.*, the vendor was to repay him 33*l.*, yet that consequence would follow if the resale rescinded the contract.

In *Hore* v. *Milner* (*t*), at Nisi Prius, in 1797, Lord Kenyon [*464] *seems to have considered a resale absolutely tortious, and estopping the vendor from setting up the former contract of sale as still subsisting. In that case, the vendor after the resale, sued the original purchaser for goods bargained and sold, and Lord Kenyon thought that by the resale, he had precluded himself from saying the goods were the property of the defendant.

In *Mertens* v. *Adcock* (*u*), in 1813, Lord Ellenborough seems to have decided at Nisi Prius, that a resale, under a power expressly reserved in the contract of sale, did not prevent the vendor from recovering the balance of the price under a count for goods bargained and sold, in other words, that the exercise of a power of resale did not rescind the contract of sale. The case is so reported as to be of little value; [it was cited in *Lamond* v. *Davall* (*x*), in 1847. In that case there was a condition that if the purchase money was not paid on the day following the sale the goods might be resold and the loss should fall on the vendee. The goods were resold and the vendor then brought this action to recover the whole purchase money from the first vendee and was nonsuited by Erle, J. On the motion, Lord Denman, C.J., said that "the power "of resale implies a power of annulling the first sale, and that "therefore the first sale is on a condition, and not absolute." In delivering the judgment of the Court, Lord Denman did not lay

(*r*) *Strickland* v. *Turner*, 7 Ex. 208; 22 L. J. Ex. 115; *Cox* v. *Prentice*, 3 M. & S. 344; *Eichholz* v. *Bannister*, 17 C. B. N. S. 708; 34 L. J. C. P. 105; *Stephens* v. *Wilkinson*, 2 B. & Ad. 320; *Giles* v. *Edwards*, 7 T. R. 181; *Gompertz* v. *Bartlett*, 2 E. & B. 849; 23 L. J. Q. B. 65.

(*s*) *Milgate* v. *Kebble*, 3 M. & G. 100, *ante*, p. 457.

(*t*) *Hore* v *Milner*. Peake, 42 n.

(*u*) *Mertens* v. *Adcock*, 4 Esp. 251.

(*x*) *Lamond* v. *Davall*, 9 Q. B. 1030; 16 L. J. Q. B. 136.

any stress on the fact that the power reserved was an express one, but appears to have decided the case simply on the ground that under the circumstances the sale must be taken to have been a conditional one. And the case appears to be no authority for what the law would be if the contract were not a conditional one.]

In *Kymer* v. *Suwercropp* (*y*), in 1807, the unpaid vendor of goods had retained part of them on the insolvency of the purchaser. He afterwards discovered that the purchaser was *agent for a [*465] solvent principal, and sued this principal, for goods bargained and sold, the defendant's counsel contended, that as to the portion of the goods stopped, the plaintiffs could not recover under the count for goods bargained and sold, as the goods were withheld from him, and the contract thereby rescinded. Lord Ellenborough overruled the objection. "The coffee, said he, "was stopped only to prevent "its getting into the hands of the insolvent brokers, and as pay-"ment was to precede the delivery, it was enough if the plaintiffs "on being paid were ready to have delivered it."

In *Greaves* v. *Ashlin* (*z*), in 1813, at Nisi Prius, before Lord Ellenborough, the facts were, that Ashlin had sold Greaves 50 quarters of oats, at 45*s.* 6*d.*, out of 175 quarters. It does not appear whether the oats were specified or severed from the 175 quarters, so as to render it a complete bargain and sale, but probably they were so. The seller soon after, gave the buyer notice that if he did not take them away he should resell them to other persons. He did resell them at 51*s.* per quarter. The plaintiff Greaves, brought an action on the contract for not delivering the goods. Lord Ellenborough said,—"If the buyer does not carry away the goods bought, "within a reasonable time, the seller may charge him warehouse "room, or he may bring an action for not removing them, if he is "prejudiced by the delay. But the buyer's neglect does not entitle "the seller to put an end to the contract. When a farmer sets out "his tithes, and gives the parson notice to take them away, he may "bring his action if the latter does not do so within a reasonable "time, but the parson's neglect does not revest in the farmer the "property in the articles set out. In this case the notice given to "fetch away the goods, could not discharge the defendant from his "contract, nor empower him to sell the property of the plaintiff."

The plaintiff recovered the difference in price. This is a decision that the default of a solvent buyer, does not give the vendor a right at his election to rescind the whole contract. *The expres- [*466] sions that seemed to shew that Lord Ellenborough thought the vendor had no more right of resale than the farmer who had set out tithes, are very worthy of attention, but are dicta merely.

These seem to be all the authorities prior to the two cases of

(*y*) *Kymer* v. *Suwercropp*, 1 Camp. 109.
(*z*) *Greaves* v. *Ashlin*, 3 Camp. 426.

Bloxam v. *Sanders* (*a*), and *Bloxam* v. *Morley* (*b*), in 1825, which, as already said (*c*), decided that the vendor's right, where he had not parted with the possession in case of insolvency, exceeded a mere lien. The reasoning of the Court in their judgment went farther, and seems to lead to the inference, that though the vendor had in their opinion more than a lien, yet he had no right to rescind the sale, and that stoppage in transitu was not a rescission of the sale. Bayley, J., in *Bloxam* v. *Sanders* (*a*), said, "The seller's "right in respect of the price, is not a mere lien which he will for-"feit if he parts with the possession, but grows out of his original "ownership and dominion, and payment or a tender of the price, is "a condition precedent on the buyer's part, and until he makes "such payment or tender, he has no right to the possession. If "goods are sold upon credit, and nothing is agreed upon as to the "time of delivering the goods, the vendee is immediately entitled "to the possession, and the right of possession and the right of pro-"perty vest at once in him, but his right of possession is not "absolute, it is liable to be defeated if he becomes insolvent before "he obtains possession, *Tooke* v. *Hollingworth* (*d*). Whether de-"fault in payment when the credit expires will destroy his right of "possession, if he has not before that time obtained actual posses-"sion, and put him in the same situation as if there had been no "bargain for credit, it is not now necessary to inquire, because this "is a case of insolvency, and in case of insolvency the point seems "perfectly clear. *Hanson* v. *Meyer* (*e*). If the seller has dis-[*467] "patched the goods to the buyer and *insolvency occurs, he "has a right in virtue of his original ownership to stop them in "transitu. *Mason* v. *Lickbarrow* (*f*), *Ellis* v. *Hunt* (*g*). *Hodgson* "v. *Loy* (*h*). *Inglis* v. *Usherwood*, (*i*), *Bohtlingk* v. *Inglis* (*k*). "Why? because the property is vested in the buyer, so as to sub-"ject him to the risk of any accident, but he has not an indefeasible "right to the possession, and his insolvency without payment of the "price defeats that right; and if this be the case after he has dis-"patched the goods, and whilst they are in transitu, *a fortiori* is it "when he has never parted with the goods, and when no transitus "has begun. The buyer, or those who stand in his place, may still "obtain the right of possession if they will pay or tender the price, "or they may still act upon their right of property if anything un-"warrantable is done to that right. If, for instance, the original

(*a*) *Bloxam* v. *Sanders*, 4 B. & C. 941, *ante*, p. 455.
(*b*) *Bloxam* v. *Morley*, 4 B. & C. 951, *ante*, p. 455.
(*c*) See *ante*, p. 455.
(*d*) *Tooke* v. *Hollingworth*, 2 T. R. 215.
(*e*) *Hanson* v. *Meyer*, 6 East, 614.
(*f*) *Mason* v. *Lickbarrow*, 1 H. Bl. 357.
(*g*) *Ellis* v. *Hunt*, 3 T. R. 464.
(*h*) *Hodgson* v. *Loy*, 7 T. R. 440.
(*i*) *Inglis* v. *Usherwood*, 1 East, 515.
(*k*) *Bohtlingk* v. *Inglis*, 3 East, 381.

"vendor sell when he ought not, they may bring a special action "against him for the injury done by such wrongful sale, and re-"cover damages to the extent of that injury, but they can maintain "no action in which right of property and right of possession are "both requisite."

It seems difficult to avoid thinking, that the Judges who concurred in that judgment were ready to decide that the vendor could not rescind the contract of sale without the consent of the buyer, even if he was in default, and that stoppage in transitu did not operate as a rescission of the contract; but it seems they were not quite ready to decide this, for in *Clay* v. *Harrison* (*l*), in 1829, some of them exercised much ingenuity to avoid the point, and formed their judgment (as appears from the statement of Parke, B., in *James* v. *Griffin* (*m*) on a ground so subtle, that we may venture to guess the Court were not agreed on the main *point or [*468] they would not have acted on such a very refined distinction.

In *Bloxam* v. *Sanders* (*n*) the Court seem to have rather carefully avoided saying whether a vendor's resale was of necessity wrongful in all cases, whilst they expressly say that the purchaser's damage by the resale, is not to be estimated by the value of the goods. The question of whether a resale conducted in such a reasonable manner as to work no damage to the purchaser, is lawful or not, was of some importance as it affected the manner of pleading and the question of costs, and also as it may affect the title of the second vendee.

In *Maclean* v. *Dunn* (*o*), in 1828, the vendor, after the purchaser had repeatedly refused to take the goods, resold them at a loss, and brought an action on the contract for not accepting the goods. It was contended that the resale operated as a rescission of the contract as against the vendors. The Common Pleas decided that it did not, and in delivering the judgment of the Court, Best, C.J., said:—"That it was clear the resale did not rescind the contract. "It is admitted that perishable articles may be resold. It is diffi-"cult to say what may be considered as perishable articles, and "what not; but if articles are not perishable, price is, and may "alter in a few days or a few hours. In that respect there is no "difference between one commodity and another. It is a practice, "therefore, founded on good sense, to make a resale of a disputed "article, and to hold the original contractor responsible for the dif-"ference. The practice itself affords some evidence of the law, and "we ought not to oppose it except on the authority of decided "cases. Those which have been cited do not apply. * * * "We are anxious to confirm a rule consistent with convenience and "law. It is most convenient, that when a party refuses to take

(*l*) *Clay* v. *Harrison*, 10 B. & C. 99, *post*, p 480.
(*m*) *James* v. *Griffin*, 2 M. & W. 632.
(*n*) *Bloxam* v. *Sanders*, 4 B. & C. 941.
(*o*) *Maclean* v. *Dunn*, 4 Bing. 722.

"goods he has purchased, they should be resold, and that he should [*469] "be liable to the loss, if any, upon the resale. *The goods "may become worse the longer they are kept, and at all events "there is the risk of the price becoming lower."

The decision in this case was, that the resale by the vendor did not rescind the whole contract, or prevent him from treating it as subsisting. The dictum of the Court goes to the extent, that the resale was perfectly legal and justifiable; probably it may be so, but there has never been a decision to that extent.

In *Acebal* v. *Levy* (*p*), in 1834, the Common Pleas (not consisting of the same Judges as in 1828) said there could be no doubt that a resale by the vendor, after a refusal on the part of the buyer to take the goods, did not prevent the vendor from suing on the original contract.

In *Martindale* v. *Smith* (*q*), in 1841, Smith had, on the 23rd April, sold Martindale six stacks of oats, payment on the 10th July, the stacks to remain, if required, till the middle of August. Smith afterwards, in the beginning of July, told Martindale that if he did not pay on the very day, he should not have the corn. Martindale did not pay on the very day, but two or three days afterwards tendered the price. Smith, who *still had the stacks in his possession*, refused to take the money, and *afterwards* sold the stacks. Martindale brought trover against him, and the Queen's Bench held it would lie, because "the vendor's right to detain the thing sold "against the purchaser, must be considered as a right of lien till "the price is paid, and not a right to rescind the bargain, and here "the lien was gone by the tender of the price."

The decision here is, that default on the part of the purchaser, gives the vendor no right to rescind the contract. The Court cannot be understood as saying, that the vendor's right was a mere right of lien, and no more: see *Milgate* v. *Kebble* (*r*).

[*470] *In two cases since *Maclean* v. *Dunn* (*s*), there have been intimations of a concurrence in the *dicta* in that case. In *Gosling* v. *Birnie* (*t*), in 1831, Tindal, C.J., intimated an opinion, that where a vendor, partially unpaid, had resold the goods, and the original purchaser afterwards paid the balance of the price, the property, nevertheless, was in the second purchaser, who had bought *bonâ fide*, but the case was disposed of on another ground.

And in *Fitt* v. *Cassanett* (*u*), in 1842, the Court of Common Pleas seem to have been of opinion that a resale, after a refusal to proceed on the part of the purchaser, was quite legal, but at all events did not entitle the purchaser to treat the contract as rescinded.

(*p*) *Acebal* v. *Levy*, 10 Bing. 376.
(*q*) *Martindale* v. *Smith*, 1 Q. B. 389.
(*r*) *Milgate* v. *Kebble*, 3 M. & G. 100, *ante*, p. 463.
(*s*) *Maclean* v. *Dunn*, 4 Bing. 722, *ante*, p. 468.
(*t*) *Gosling* v. *Birnie*, 7 Bing. 339.
(*u*) *Fitt* v. *Cassanett*, 4 M. & G. 898.

[The question of the right of one of the parties to rescind a contract where the other party is in default, has arisen on several occasions where there was a contract to deliver goods by instalments, and there has been a failure either in the delivery of an instalment or the payment for it; and although it is perhaps impossible to reconcile all the cases, yet the difference of judicial opinion becomes very much smaller if the case of *Hoare* v. *Rennie* (*x*) be disregarded for this purpose, and the judgments of Field, J., in *Honck* v. *Muller* (*y*), in the Court below, and of Brett, L.J., in the Court of Appeal, be considered as the correct ones.

If a contract, say for the delivery of 1000 tons of iron, by ten equal instalments, be construed as what is called one entire contract to supply a thousand tons in a specified time, then, if the contract cannot be performed in the manner specified, the party failed against may refuse to have any other arrangement substituted; and just as he might decline to accept nine hundred tons when he had contracted for a thousand to be delivered all at one time, so he may refuse to accept nine hundred when he had contracted for one thousand *to be delivered at stated times. And if the con- [*471] tract be so construed, and cannot be performed strictly according to its terms, then the party failed against may rescind the contract or bring his action. This, possibly, was the view which the Court took of the contract in *Hoare* v. *Rennie* (*x*).

But if the contract be construed as a promise by one party to do a series of acts, *i.e.*, to deliver instalments, it seems impossible to say that if there is a failure to do one of those acts, that there is a total failure of the consideration for the other party's promises such as would justify the other party in rescinding(*z*).

"The rule of law is, that all things to be performed by a party "to an agreement on his part, are the consideration for all to be "performed by the other party" (*a*).

Which of these is the true construction of the contract may be a question of some difficulty, but when damages are a sufficient recompense for a partial failure, it seems difficult to suppose that the parties intended that either of them should have any such a disproportionate remedy as a power to rescind the contract.

No doubt the remedy by way of damages may prove to be inadequate, as in the case of the insolvency of the party in default; but that is a contingency which is unavoidable where this course of dealing is adopted.

Where the failure of one party to perform one of the acts promised to be done is such that the other party is justified in concluding that the party failing wishes to rescind, then he may elect to

(*x*) *Hoare* v. *Rennie*, 5 H. & N. 19; 29 L. J. Ex. 73.
(*y*) *Honck* v. *Muller*, 7 Q. B. D. 104; 50 L. J. Q. B. 529.
(*z*) *Boon* v. *Eyre*, 2 W. Bl. 1312; 1 H. Bl. 273, n.; and *ante*, p. 199.
(*a*) *Per* Bramwell, B., in *Sanderson* v. *Graves*, L. R. 10 Ex. 537; 44 L. J. Ex. 310.

rescind. The evidence from which an intention on the part of the person failing to abandon the contract may be inferred by the other party may be of various kinds, as insolvency, or long delay after the other party has given notice of his wish to abandon it, or an express notice; for just in the same way that where one party gives notice that he does not intend to perform his part of the contract, [*472] the *other may take him at his word, and elect to consider his refusal as a breach (c), so he may elect to rescind. And there does not seem to be any distinction, as a matter of evidence, between a failure as to the first instalment or a failure as to some subsequent instalment (d), for the part performance, by accepting the prior instalments, being according to the contract, is consistent with either construction.

It has been argued that if the vendor retakes possession of the goods after having delivered them, that that is evidence from which an intention to rescind the contract may be gathered; but this has been decided not to be the case (e).

If goods have been delivered according to contract, and then, in consequence of the vendee's conduct, the vendor elects to rescind the contract the vendor cannot bring an action upon the contract for the price of the goods delivered, for it is gone, but can recover whatever he can prove to be the value of the goods (f).

Withers v. *Reynolds* (g), in 1831, was an action for damages for not delivering straw. Reynolds, the defendant, had contracted to supply Withers, the plaintiff, with straw at the rate of three loads a fortnight, from October to the following June, payment on delivery. He supplied the straw up to January, when Withers who had paid for all that had been delivered except the last load, said that in future he should always keep one load in hand. Reynolds then refused to deliver any more straw unless it was paid for on delivery. Lord Tenterden, C.J., and Parke, Taunton, and Patteson, JJ., held that when the plaintiff said he would not pay on delivery, the defendant was not obliged to go on supplying him. Patteson, J., said: "If the plaintiff had merely failed to pay for any particular [*473] "load, that, of itself, might not *have been an excuse to the "defendant for delivering no more straw; but the plaintiff here ex "pressly refuses to pay for the loads as delivered."

In *Hoare* v. *Rennie* (h), in 1859, the plaintiffs contracted to deliver a certain quantity of iron in four equal monthly instalments. They delivered practically nothing in the first month, and the de-

(c) *Cort* v. *Ambergate Ry. Co.*, 17 Q. B. 127; 20 L. J. Q. B. 460, *post*, p. 486.
(d) *Per* Brett, L. J., in *Honck* v. *Muller*, 7 Q. B. D. 104; 50 L. J. Q. B. 529.
(e) *Stephens* v. *Wilkinson*, in 1831, 2 B. & Ad. 320; *Gillard* v. *Brittan*, in 1841. 8 M. & W. 575; *Page* v. *Cowasjee*, in 1866, L. R. 1 P. C. 127; 3 Moore, P. C. C. N. S. 499.
(f) *Bartholomew* v. *Markwick*, in 1864, 33 L. J. C P. 145; 15 C. B. N. S. 710.
(g) *Withers* v. *Reynolds*, 2 B. & Ad. 882.
(h) *Hoare* v. *Rennie*, 5 H. & N. 19; 29 L. J. Ex. 73, *ante*, p. 217.

fendants refused to take any of the iron. The case was heard on demurrer, and the Court held that the plaintiffs could not recover. It is, however, more than doubtful whether the Court would put the same construction on this contract as reported if the same case were ever tried again.

In *Jonassohn* v. *Young* (*i*), in 1863, the plaintiffs agreed to sell to the defendant as much gas coal equal to sample, as a certain steamship could carry from Sunderland to London in nine months. The plaintiffs said that the defendant after taking part of the coals refused to send the ship to take any more. The defendant pleaded that the coal delivered by the plaintiffs was not equal to sample, and that the plaintiffs had detained the ship longer than necessary. On demurrer the Court, consisting of Wightman, Crompton, and Blackburn, JJ., held that the plea was no answer to the declaration.

In *Simpson* v. *Crippin* (*k*), in 1872, the defendants agreed to sell to the plaintiffs 6000 to 8000 tons of coal, to be delivered into waggons to be sent by the plaintiffs to the defendant's collieries, in equal monthly quantities during a period of twelve months. During the first month the plaintiff sent waggons for 158 tons only, instead of at least 500. The defendants, at the expiration of the month, gave notice that, as the regular and punctual withdrawal of the stipulated quantity in each month was the sole inducement for them to entertain the contract, they now cancelled it, and refused to deliver any more coal. The Court of Queen's Bench held that the defendants were not entitled to do so, notwithstanding the plaintiffs' breach.

*In *Ex parte Chalmers* (*l*), in 1873, the facts were that [*474] Hall and Co. contracted to sell Edwards 330 tons of bleaching-powder, to be delivered at the rate of thirty tons a month from February to December, both inclusive, payment by cash fourteen days after each delivery. All the deliveries up to and including the October one were delivered and paid for: the November instalment was delivered, but not paid for. On the 20th of December Edwards became insolvent, and on the 23rd of December Hall and Co. wrote to him, "We give you notice that we refuse to deliver any more bleaching-powder upon your contract." The December instalment was not delivered. Edwards was adjudicated bankrupt, and Chalmers, as trustee, claimed the delivery of thirty tons of bleaching-powder; and on Hall and Co.'s refusal, he claimed 150*l.* damages.

The Court held he could not do so. Sir G. Mellish, L.J., delivered a judgment in which Lord Selborne, L.C., and Sir W. M. James, L.J., concurred. He said: "The first question that arises "is what are the rights of a seller of goods when the purchaser be- "comes insolvent before the contract for sale has been completely

(*i*) *Jonassohn* v. *Young*, 4 B. & S. 296; 32 L. J. Q. B. 285.
(*k*) *Simpson* v. *Crippin*, L. R. 8. Q. B. 14; 42 L. J. Q. 28, *ante*, p. 219.
(*l*) *Ex parte Chalmers*, 8 Ch. Ap. 289; 42 L. J. Ch. 37.

"performed? I am of opinion that the result of the authorities is "this—that in such a case the seller, notwithstanding he may have "agreed to allow credit for the goods, is not bound to deliver any "more goods under the contract until the price of the goods not "yet delivered is tendered to him; and that if a debt is due to him "for goods already delivered he is entitled to refuse to deliver any "more till he is paid the debt due for those already delivered, as "well as the price of those still to be delivered. * * I agree "with what was said by Crompton, J., in *Griffiths* v. *Perry* (*m*), that "the mere fact of the insolvency of the purchaser did not put an "end to the contract. It certainly would be very unfair if it had "that effect" (*n*).

[*475] *In *Morgan* v. *Bain* (*o*), in 1874, the defendants had, on the 5th of February, contracted to sell to the plaintiffs 200 tons of iron. On the 12th of March, the plaintiffs, finding themselves unable to meet their liabilities, determined to suspend payment, and informed the defendants of the fact on the 14th of March. On the 5th of April the first meeting of the creditors was held, at which it was agreed to accept a composition of five shillings in the pound. The plaintiffs did not refer to their contract with the defendants in their statement of affairs, but it was known to those present at the meeting. By the 1st of May three new partners had joined the plaintiff's firm, and as iron had risen, they, on the 13th of May, demanded a delivery of the iron pursuant to the contract. The defendants at once repudiated the contract. It was stated in argument that by the usage of the iron trade no delivery would be due under the contract until the 1st of April. Lord Coleridge, C.J., delivering judgment for the defendant, said: "The question that is "raised for our consideration is, whether, on the 13th of May, "there had been a rescission of the contract. Rescission must be "by both parties; either both must have intended to rescind, or one "must have so acted as to justify the other in thinking that he in-"tended to rescind. * * * Non-payment for one or two instal-"ments of the iron would not be, *per se*, conduct justifying the "conclusion on the vendor's part that the purchaser intended to "abandon the contract. There might, however, be additional cir-"cumstances in connection with which such non-payment would be "sufficient to justify such a conclusion on the vendor's part. "Here the purchaser was insolvent. It would be, it appears to me, "in accordance with what I have before said as to the law on this "subject, the duty of the insolvent purchaser, if he meant to insist "on the contract, to claim delivery of the instalments from time to "time as they became due, and to offer cash in payment for them."

(*m*) *Griffiths* v. *Perry*, 1 E. & E. 688; 28 L. J. Q. B. 204.

(*n*) [As to what justifies a vendor in considering the vendee to be insolvent, see *In re Phœnix Bessemer Steel Co., Ex parte Carnforth Hæmatite Iron Co.*, in 1876, 4 Ch. D. 108; 46 L. J. Ch. 115; and *ante*, p. 381.]

(*o*) *Morgan* v. *Bain*, L. R. 10 C. P. 15; 44 L. J. C. P. 47.

In the case of *Ex parte Stapleton* (*p*), in the Court of Appeal *in 1879, Stapleton contracted to sell to Nathan a cargo of [*476] maize; subsequently, on the 19th of January, Nathan filed a liquidation petition, and a receiver was appointed, and a correspondence took place between Stapleton and the receiver. On the 31st of January Stapleton wrote to the receiver, "I propose to sell at a time when I shall consider most advisable, and then claim on the estate for the loss. Have you any proposal to make?"

On the 6th of February, the market being a falling one, Stapleton contracted to sell the cargo to Schröder and Co. for 688*l.* less than Nathan had contracted to pay. On the 7th of February, the receiver wrote to inform Stapleton that he had no right to deal with the cargo, before tendering it to him. On the 8th, Stapleton tendered it, and the receiver, on the 12th, wrote, that as Stapleton had resold before tendering, he reserved his right to regard the contract as cancelled. Stapleton tendered a proof against the estate of Nathan for 688*l.* The Court allowed the claim. Jessel, M.R., said: "I am of opinion that if a person who has entered into a "contract of this kind gives to the vendor before he has parted with "the goods that which amounts in effect to this notice, 'I have "parted with all my property, and am unable to pay the price "agreed upon,' it is equivalent to a repudiation of the contract. "Of course that would not affect the right of the trustee in liqui-"dation to elect to fulfil the contract on paying the price in cash, "provided that he does so within a reasonable time. But, if he "does not do that, I think that the vendor is entitled to treat the "contract as broken, without making any tender of the goods to the "trustee."

In *Freeth* v. *Burr* (*q*), in 1874, the facts were that on the 28th of November, 1871, the plaintiffs agreed to buy of the defendants 250 tons of pig iron, "half to be delivered in two weeks, remainder in four weeks. Payment, net cash fourteen days after delivery of each parcel. The market was a rising one. No iron was delivered until the 15th of February, *when 10½ tons were sent to [*477] the plaintiffs, who complained of the unpunctual deliveries, and enquired whether the defendant would deliver the remainder of the iron, or whether they should buy in against him; the defendant said it was his intention to deliver the remainder. On the 29th of May, 125 tons had been delivered, and the defendant asked for payment for them, promising to deliver the remainder. The plaintiffs declined to pay, under the belief that they were entitled to deduct from the amount due to the defendant any loss which they might incur in case the defendant should fail to deliver the remainder of the iron, and in reply to a letter from the defendant demanding payment, put forward a claim for 250*l.*, being 2*l.* per ton on the 125 tons undelivered. The plaintiffs, ultimately (but not until after an

(*p*) *Ex parte Stapleton*, 10 Ch. D. 586.
(*q*) *Freeth* v. *Burr*, L. R. 9 C. P. 208; 43 L. J. C. P. 91.

action had been brought to recover the price) paid for the 125 tons delivered, and then brought this action for the refusal to deliver the remaining 125 tons, and obtained a verdict subject to the opinion of the Court. The Court upheld the verdict, and Lord Coleridge, C.J., said that "in cases of this sort, where the question "is whether the one party is set free by the action of the other, the "real matter for consideration is whether acts or conduct of the one "do or do not amount to an intimation of an intention to abandon "and altogether to refuse performance of the contract. The true "question is, whether the acts and conduct of the party evince an "intention no longer to be bound by the contract." And this statement was frequently approved in the case of *Mersey Steel and Iron Co.* v. *Naylor* (*r*) in the House of Lords in 1884.

In *Bloomer* v. *Bernstein* (*s*), in 1874, the plaintiff had agreed to buy from 3,650 to 5,110 tons of old iron rails, "delivery to take place during 1872, and to be completed in December of that year. payment, net cash against bill of lading." On the 27th of January the defendant sent the plaintiff an invoice for 257 tons amounting to 1,390*l.*, which sum was paid by the plaintiff, and he received the [*478] bill of *lading. On 31st of January an invoice was sent to the plaintiff for a further quantity of rails amounting to 907*l.*, but the plaintiff did not take up the bills of lading. On the 7th of February the defendant gave notice that if the bills of lading were not taken up the iron would be sold. On the 13th of February it was sold in a rising market, for a sum greater than the contract price. On the 14th of February the defendant informed the plaintiff that as he had not taken up the bills of lading the contract would be cancelled. A correspondence followed, and finally on the 19th of February the plaintiff wrote to the defendant saying that if the iron was not delivered he would buy in against him. On the 20th of February the defendant again said that the contract was rescinded. The plaintiff filed a petition for liquidation on the 22nd of February. The creditors determined to have nothing to do with the plaintiff's contracts, and on the 28th of June, after a composition had been accepted, reassigned to the plaintiff his estate. On the 23rd of July the plaintiff wrote to the defendant demanding a renewal of the deliveries. No demand had been made between February and July, and it was held by Lord Coleridge, C. J., Brett and Grove, JJ., that the defendant was justified in repudiating the contract, the jury having found that a state of things had existed which justified the defendants in believing that the contract was intended to be put an end to by the plaintiff.

In *Brandt* v. *Lawrence* (*t*), in 1876, the defendant having contracted with the plaintiff to purchase a large quantity of oats to be shipped by steamer or steamers, refused to accept both ship loads

(*r*) *Mersey* v. *Steel and Iron Co.* v. *Naylor*, 9 Ap. Ca. 434; 53 L. J. Q. B. 497.
(*s*) *Bloomer* v. *Bernstein*, L. R. 9 C. P. 588; 43 L. J. C. P. 375.
(*t*) *Brandt* v. *Lawrence*, 1 Q. B. D. 344; 46 L. J. Q. B. 237, *ante*, p. 225.

on the ground that they had not been shipped within the stipulated time. The jury found that the first ship had been loaded in time but not the second, and the Court held that he was bound to accept the first, for when it was tendered there was nothing to show that the plaintiff would not or could not complete the contract.

In *Oleaga* v. *West Cumberland Iron and Steel Co.* (*u*), in *1879, the contract was for the sale of a certain quantity of [*479] Spanish iron ore, to be delivered by instalments when freights should be below a certain limit. Partly through freights being above the limit, and partly through wars in Spain, a large quantity was undelivered long after the expiration of the time within which all would have been delivered but for those circumstances. The defendants refused to accept any more. But the Court seems to have been of opinion that they were bound to accept deliveries postponed by reason of high freights.

In *Honck* v. *Muller* (*x*), in 1881, the defendant had in October, 1879, agreed to sell and deliver to the plaintiff 2,000 tons of pig iron "in November, 1879, or equally over November, December, and January next at 6*d.* per ton extra." On the 1st of November the defendant wrote to the plaintiff's agent asking if he would take the whole of the iron in November; a correspondence passed, and on the 22nd of November the plaintiff's agent wrote to the defendant asking him to defer shipping any of the iron until December so as to allow the plaintiff to take delivery of all in December and January. The defendant replied on the 1st of December that he had cancelled the contract; to which the plaintiff answered that he declined to consider the contract rescinded. Field, J., at the trial, held that the plaintiff was entitled to recover, but in the Court of Appeal Bramwell and Baggallay, L. JJ., were of opinion that the plaintiff had no cause of action, Brett, L. J., dissenting.

The last case on the subject appears to be the *Mersey Steel and Iron Co.* v. *Naylor* (*y*), in 1884, in which Lord Coleridge's judgment in *Freeth* v. *Burr* (*z*), was adopted as a correct statement of the law.]

The cases in which the purchaser, though in default, was not insolvent are not necessarily authorities for the extent of *the [*480] vendor's rights, when there has been insolvency, and still less for the effects of stoppage in transitu. But the subjects are very closely connected, and if the one class of vendor's rights were clearly and accurately defined, it would go far to settle the extent of the others.

If the vendor had a right to rescind the contract after a default in the purchaser, it would be very reasonable that he should have the same right on his insolvency before default, and that a stoppage

(*u*) *Oleaga* v. *West Cumberland Iron and Steel Co.*, L. R. 4 Q. B. D. 472.
(*x*) *Honck* v. *Muller*, 7 Q. B. D. 92; 50 L. J. Q. B. 529.
(*y*) *Mersey Steel and Iron Co.* v. *Naylor*, 9 Q. B. D. 648; 51 L. J. Q. B. 576; 9 Ap. Ca. 434; 53 L. J. Q. B. 497.
(*z*) *Freeth* v. *Burr*, L. R. 9 C. P. 208; 43 L. J. C. P. 91, *ante*, p. 477.

in transitu should be considered as an election to exercise that right; but it is difficult to see how the vendor could acquire a power to rescind the contract, by the act of putting the goods in motion, and then stopping them, if he had it not before.

The right to stop in transitu may, as we have seen, be exercised by the vendor, although he is partially paid, *Hodgson* v. *Loy* (*a*); or, although he has received bills for the full price which he has negotiated, and which are outstanding, *Feize* v. *Wray* (*b*), and that without tendering or returning either the money or the bills, *Edwards* v. *Brewer* (*c*). It seems very difficult to consider the stoppage in transitu as amounting to a rescission of the contract, when the vendor may exercise it when he has not restored, and, as in *Feize* v. *Wray* (*b*), from his own insolvency, cannot restore the purchaser to his original position. No such difficulty is in the way if the stoppage is considered as doing no more than putting the vendor in possession of the goods as a security.

In *Clay* v. *Harrison* (*d*), in 1829, which was an action on a policy of insurance, there had been an agreement for the supply of goods free on board. The vendor shipped the goods accordingly, and by so doing appropriated them to the contract, and converted the agreement into a bargain and sale. The purchaser insured his interest in the goods; they were damaged by one of the perils in- [*481] sured against; then the *purchaser became insolvent, and the vendor stopped the goods, already damaged, in transitu. The insurers contended that the stoppage in transitu rescinded the contract, and put an end to the purchaser's interest in the goods, so that he had sustained no damage. The assignees contended that the bankrupt retained the general property in the goods. The King's Bench took time to consider, and decided in favour of the insurers; but it appears from Mr. Baron Parke's statement, in *James* v. *Griffin* (*e*), that they decided it on the special ground, that in this case the only appropriation of the goods was that accompanying the parting with possession, and that, as the stoppage in transitu at all events put the party in the same position as if he had not parted with the possession, it must undo the appropriation that accompanied that parting with possession, so that the goods, which were in fact lying shattered and valueless on the beach at Elsinore, were, in contemplation of law, in the same position as if they had never left the vendor's warehouses at St. Petersburg.

It seems a fair inference, that the Judges who adopted such a very artificial distinction, in order to avoid deciding what was the effect of stoppage in transitu, were not able to agree in forming their judgment on the general question.

(*a*) *Hodgson* v. *Loy*, 7 T. R. 455, *ante*, p. 326.
(*b*) *Feize* v. *Wray*, 3 East, 95, *ante*, p. 321.
(*c*) *Edwards* v. *Brewer*, 2 M. & W. 375.
(*d*) *Clay* v. *Harrison*, 10 B. & C. 99.
(*e*) *James* v. *Griffin*, 2 M. & W. 632.

In *Gibson* v. *Carruthers* (*f*), in 1841, the Court of Exchequer differed, in a case which, though not directly involving this point, yet threw considerable light on their Lordships' opinions upon it. In that case, Harris had agreed with Carruthers and Co., that he should charter a ship, and send her out to Odessa, that Carruthers and Co. should there load her with linseed, and have the bills of lading made out to their order, and that Harris should pay the price on the receipt of the invoice and bill of lading. Harris did send out the vessel, but became bankrupt before her arrival, and Carruthers and Co. refused to load the vessel. The question in the cause was, whether the assignees of the bankrupt *could [*482] maintain an action for this refusal. It is clear that no question about stoppage in transitu was directly involved in this; the goods were never even appropriated, far less put in transitu, and what the defendants sought was, to consider the insolvency an excuse for not proceeding with an executory contract. But the subject was analogous to that of stoppage in transitu, and Lord Abinger delivered a very interesting judgment, in which he assumes that Carruthers and Co. might, if they had put the goods on board, have altered the consignment and stopped them in transitu, and that if they had done so, it would have operated as a rescission of the contract, and on these assumptions, he argues very convincingly, that they must have a right to rescind the contract before putting the goods on board; for this, amongst other reasons, he thought that the plaintiffs could not recover. The other three Judges, Parke, B., Gurney, B., and Rolfe, B., were of a different opinion. They pointed out that there was not to be any transitus, properly so called, in this case, as Carruthers and Co. were to keep the control of the goods till payment, and they confine their judgment to the single point, that bankruptcy or insolvency does not by itself render an executory contract voidable, at the election of the solvent party. But though they in express words avoid deciding what the effect of stoppage in transitu would have been, it is not too much to say, that the tendency of their reasoning, and especially of that of Parke, B., is to show that stoppage in transitu does not do more than restore to the vendor a security for the unpaid price, and does not rescind the contract.

In *Wentworth* v. *Outhwaite* (*g*), in 1842, the point was discussed before Lord Abinger, Parke, B., Alderson, B., and Rolfe, B., and the Court then, though not deciding the point, intimated that Lord Abinger thought that, subject to some qualifications, stoppage in transitu did operate as a rescission of the contract, and that the other three Judges were strongly inclined to think, that its effect was only to replace the *vendor in the same position as [*483] if he had not parted with the possession, and entitle him to hold the goods until the price was paid down.

(*f*) *Gibson* v. *Carruthers*, 8 M. & W. 321; 11 L. J. Ex. 145.
(*g*) *Wentworth* v. *Outhwaite*, 10 M. & W. 436; 12 L. J. Ex. 172.

In that case the goods were despatched in two parcels, by two different carriers; one parcel was stopped in transitu, the other reached their destination. The question was, what effect this partial stoppage in transitu had upon the insolvent's property in the other parcel. Parke, B., in delivering the judgment of the Court, said, "What the effect of stoppage in transitu is, whether entirely to rescind the contract, or merely to replace the vendor in "the same position as if he had not parted with the possession, and "entitle him to hold the goods until the price be paid down, is a "point not yet finally decided, and there are difficulties attending "each construction. If the latter supposition be adopted (as most "of us are strongly inclined to think it ought to be, on the weight "of authority), the vendor is entitled to retain the part actually "stopped in transitu, till he is paid the price of the whole, but has "no right to retake that which has arrived at its journey's end. "His right of lien is reverted on the part stopped but no more. "My Lord Chief Baron has expressed an opinion to which he still "adheres, that the contract is rescinded by a stoppage in transitu, "but he does not think that this affects the right of the vendee to "retain that portion of the goods which have been actually delivered to him, or in other words, have reached the place of their "destination, more especially when the goods and the price may "be apportioned, as in the present case, and a new contract be implied from the actual delivery and retention of a part."

It is to be observed, that Lord Abinger, whilst holding that stoppage in transitu rescinded the contract, yet did not hold that this rescission was complete, or to be followed by all the consequences which attend a rescission. He never had occasion during his life to explain what the precise force of these qualifications was, but it seems probably that he would, if called upon to explain his views, [*484] have said, as he hinted in **Gibson* v. *Carruthers* (*h*), that stoppage in transitu was an arbitrary rule, adopted for the advantage of trade, and that no common law phrase could exactly express its effect, but that "rescission" came nearest to it, but that such qualifications must be attached as were by usage found to be for the advantage of trade.

But, however doubtful it may have been formerly, it seems to be clear law now that stoppage in transitu is not a rescission of the contract (*i*).

[Hitherto the rights which the vendor has over the goods before they have come into the vendee's possession, and the vendor's right to withhold delivery, to stop in transitu, to retake possession, to resell and to rescind have been the chief subject of investigation. It is now proposed to consider the other remedies which are available

(*h*) *Gibson* v. *Carruthers*, 8 M. & W. 321, *ante*, p. 481.
(*i*) Per Cairns, L.J., in *Schotsmans* v. *Lancashire & Yorkshire Ry. Co.*, L. R. 2 Ch. Ap. 340; 36 L. J. Ch. 366.

to the party failed against where there has been a breach of contract.

It is usual to speak of the failure of either party to do what he has promised to do as "a breach of the contract." Correctly speaking, it is the promise to do so something which has been broken, the contract with all its liabilities remains binding. The rights and remedies of either party, where there has been a breach of contract are so closely connected that it would be mere repetition to consider them separately.

In the first place it will be desirable to refer to the effect which a condition precedent has upon the position of the parties. In the case of a simple bargain and sale, the vendee cannot be called upon to pay the price of the goods until the two implied conditions precedent, viz., that the property in the goods shall have been passed to him, and that the vendor shall have delivered or tendered them, shall have been performed. If there are no special terms in the contract the property passes to the vendee as soon as the bargain is concluded, and the goods are then at the vendee's risk and he must pay for them; but it may be that the parties to the contract have agreed that the property shall not pass until *some event has hap- [*485] pened. In such a case the happening of that event is a condition precedent to the passing of the property, and to the vendee's obligation to pay.

When the property has passed, the vendee is not liable to pay for the goods until the vendor delivers or tenders them. But if the vendor is unable to tender them, in consequence of the goods having perished, he is in law released from his obligation to tender, and the vendee must pay for the undelivered goods if the property had passed to him, on the principle laid down in *Taylor* v. *Caldwell* (*k*), in 1863, "The principle seems to us to be that in contracts "in which the performance depends on the continued existence of "a given person or thing, a condition is implied, that the impossibility "arising from the perishing of the person or thing shall excuse the "performance (*l*).

If the party who has a right to avail himself of a condition precedent has waived it, or prevented it from happening or being performed (*m*), he cannot afterwards avail himself of it. If the vendee refuses before the vendor tenders the goods to accept them when tendered, the vendor may at once elect to consider the vendee's refusal as a breach of contract, and bring his action for damages for the breach before the time for performance has arrived, or the vendor may decline to consider the refusal as a breach, and in that case the contract cannot be considered as broken, and each party is bound to do all that he has undertaken to do (*n*). If the vendor or the vendee

(*k*) *Taylor* v. *Caldwell*, 3 B. & S. 826; 32 L. J. Q. B. 164.
(*l*) See the cases mentioned in the note, *ante*, p. 230.
(*m*) *Mackay* v. *Dick*, 6 Ap. Ca. 251.
(*n*) *Post*, p. 487.

refuse to perform his part, the other party need not actually tender the goods or the price. He shows a good cause of action if he can prove that he was ready and willing to do so.

In the case of *Ripley* v. *M'Clure* (*o*), in 1849, the contract was, that the plaintiff, to whom a cargo of tea was to be consigned from [*486] China, was to sell and deliver one third of it to *the defendant in Belfast as soon as it should there arrive. Before the arrival of the cargo the defendant became dissatisfied with the contract, and a correspondence ensued, from which the plaintiff concluded that the defendant did not intend to fulfil his contract, and sold the tea on its arrival without tendering, and brought this action against him for breach of contract. In delivering the judgment of the Court on the motion for a new trial, Parke, B., said that the question left to the jury was, "Whether there was a refusal at any time, and whether "that refusal had been subsequently retracted; and the jury having "found, as we think they were warranted by the evidence to do, "that it had not, there was certainly evidence of a continual refusal "down to and inclusive of the time when the defendant was bound "to receive, which would render the defendant liable, if all the con-"ditions precedent had been performed or waived (*p*)." And when Lord Campbell, C. J., was delivering judgment in *Cort* v. *Ambergate Railway Co.* (*q*), he said that it was decided in *Ripley* v. *M'Clure* (*o*), "that a refusal by the defendant before the arrival of "the cargo to perform the contract was not of itself necessarily a "breach of it, but that such refusal, unretracted down to, and in-"clusive of the time when the defendant was bound to receive the "cargo, was evidence of a continuing refusal and a waiver of the "condition precedent of delivery, so as to render the defendant "liable for the breach of contract."

Next came the leading case of *Cort* v. *Ambergate Railway Co.* (*q*), in 1851, where the plaintiffs had contracted to supply the defendants with a large quantity of railway chairs. They delivered some of them, and then the defendants declined to receive any more. For the purpose of enabling themselves to carry out their contract, the plaintiffs had gone to considerable expense in buildings. The plaintiffs sued the defendants for damages for not accepting, and the defendants pleaded by the way of defence that the plaintiffs had [*487] never *tendered the chairs, and that they had not been prevened tfrom doing so by them. Lord Campbell, C.J., on the motion for a new trial, said it was not denied that if the defendant's would have accepted and paid for the chairs the plaintiffs would have supplied them, and continued, "We are of opinion, however, that the jury "were fully justified upon the evidence in finding that the plaintiffs "were ready and willing to perform the contract, although they "never made and tendered the residue of the chairs."

(*o*) *Ripley* v. *M'Clure*, 4 Ex. 345; 18 L. J. Ex. 419.
(*p*) See also *Planché* v. *Colburn*, 8. Bing. 14.
(*q*) *Cort* v. *Ambergate Ry. Co.*, 17 Q. B. 127; 20 L. J. Q. B. 460.

In *Frost* v. *Knight* (*s*), in 1872, Cockburn, C. J., delivering a judgment in which Keating and Lush, J. J., concurred, said (*t*), "The law with reference to a contract to be performed at a future "time where the party bound to performance announces prior "to the time his intention not to perform it, as established by the "cases of *Hochster* v. *De la Tour* (*u*), and the *Danube and Black* "*Sea Company* v. *Zenos* (*x*), on the one hand, and *Avery* v. *Bow-* "*den* (*y*), *Reed* v. *Hoskins* (*z*), and *Barwick* v. *Buba* (*a*), on the "other, may be thus stated. The promisee, if he pleases, may "treat the notice of intention as inoperative, and await the time "when the contract is to be executed and then hold the other party "responsible for all the consequences of non-performance. But in "that case he keeps the contract alive for the benefit of the other "party as well as his own; he remains subject to all his own obliga- "tions and liabilities under it, and enables the other party not only "to complete the contract if so advised, notwithstanding his pre- "vious repudiation of it, but also to take advantage of any super- "vening circumstance which would justify him in declining to com- "plete it.

"On the other hand, the promisee may, if he thinks proper, "treat the repudiation of the other party as a *wrongful put [*488] "ting an end to the contract, and may at once bring his action as "on a breach of it; and in such an action he will be entitled to "such damages as would have arisen from the non-performance of "the contract at the appointed time, subject, however, to abatement "in respect of any circumstances which may have afforded him the "means of mitigating his loss." The words "a wrongful putting an end to the contract" were probably used only in the sense of breaking the contract and not as rescinding it.

But there is nothing to prevent the parties from introducing into their agreement any stipulations or conditions they may think desirable: and these stipulations may make the obligation of either party to be independent or what would otherwise have been an implied condition precedent.

Thus, if the parties think well to agree to it, they may agree that the vendee shall pay the price at once, and this quite independently of where the property is, and of whether the goods have been tendered or not. And on the other hand they may agree that the vendee shall not be called upon to pay the price, although the prop-

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(*s*) *Frost* v. *Knight*, L. R. 5 Ex. 322; L. R. 7 Ex. 11; 39 L. J. Ex. 277; 41 L. J. Ex. 78.

(*t*) L. R. 7 Ex. 112; 41 L. J. Ex. 79.

(*u*) *Hochster* v. *De la Tour*, 2 E. & B. 678; 22 L. J. Q. B. 455.

(*x*) *Danube and Black Sea Co.* v. *Zenos*, 11 C. B. N. S. 152; 13 C. B. N. S. 825; 31 L. J. C. P. 84; 31 L. J. C. P. 284.

(*y*) *Avery* v. *Bowden*, 6 E. & B. 953; 26 L. J. Q. B. 3.

(*z*) *Reid* v. *Hoskins*, 6 E. & B. 953; 26 L. J. Q. B. 5.

(*a*) *Barwick* v. *Buba*, 2 C. B. N. S. 563; 26 L. J. C. P. 280.

erty has passed to him and the goods have been delivered, until the happening of some event, as in the case of a sale on credit.

The extent to which the obligations of the parties are within their own control may be seen from the judgment of Blackburn, J., in the case of the *Calcutta Co.* v. *De Mattos* (*b*), cited on page 235.

In *Dunlop* v. *Grote* (*c*), in 1845, the defendants had, in March, contracted to buy from the plaintiffs 1000 tons of iron to be delivered before the end of April, "and if the delivery of the said iron should not be required by the defendants on or before the 30th day of April then next ensuing, the said iron was to be paid for by the defendants on the day and year last aforesaid." The defendants paid a portion of the price and refused to pay the balance. Cresswell, J., held *that the plaintiffs were entitled to recover the whole sum. [*489]

And in *Castle* v. *Playford* (*d*), in 1870, the defendant agreed to purchase from the plaintiffs a quantity of ice, the vendors "forwarding bills of lading to the purchaser; and upon receipt thereof the said purchaser takes upon himself all risk and dangers of the seas, rivers, and navigation of whatever nature or kind soever; and the said H. H. Playford agrees to buy and receive the said ice on its arrival at ordered port * * * and to pay for the same in cash on delivery, at and after the rate of 20*s.* sterling per ton of 20 cwt. weighed on board during delivery." * * * The plaintiffs shipped a cargo, and forwarded the bill of lading to the defendant by whom it was received.

The ice was lost during the voyage and the defendant refused to pay for it. It was held on Appeal by Cockburn, C. J., Willes, Blackburn, Mellor, Brett, and Grove, JJ., that he was bound to pay for it: Blackburn, J., saying, "The parties in this case have agreed, "whether the property passed or not, that the purchaser should, "from the time he received the bills of lading, take upon himself "all risks and dangers of the seas; and * * * I do not see what risk "he took upon himself at all, unless it was this that he said, 'If the "'property perishes by the dangers of the seas, I shall take the risk "'of having lost the property, whether it be mine or not.'" (*e*).

It may be that although the condition precedent which has not been performed was something to be performed by one of the parties to the contract, yet if it was merely a condition, and not accompanied by a promise by that party to perform it, that party will not be liable to the other for the non-performance. The question is simply, has that person promised to perform it, or promised or undertaken that it shall be performed; if he has, he is liable in dam-

(*b*) *The Calcutta Co.* v. *De Mattos*, 32 L. J. Q. B. 321.

(*c*) *Dunlop* v. *Grote*, 2 Car. & Kir. 153.

(*d*) *Castle* v. *Playford*, L. R. 5 Ex. 165; 39 L. J. Ex. 150; L. R. 7 Ex. 98; 41 L. J. Ex. 44.

(*e*) See also *Martineau* v. *Kitching*, L. R. 7 Q. B. 436; 41 L. J. Q. B. 227, *ante*, p. 182; and *Tregelles* v. *Sewell*, 7 H. & N. 574, *ante*, p. 233.

ages if he *does not perform it or it is not performed. If [*490] the contract was merely that if he performs it or if it happens then certain results are to follow, he is not liable.

Thus in *Boyd* v. *Siffkin* (*f*), in 1809, the vendee sued the vendor for not delivering hemp which by the contract was to be delivered when it should arrive by a certain vessel. The vessel arrived but with no hemp on board, and the plaintiff was nonsuited (*g*).

Vernede v. *Weber* (*h*), in 1856, was an action for not delivering. The contract was in these terms, "Bought for account of Messrs. Vernede and Company, of Mr. C. F. Weber, the cargo of 400 tons (provided the same be shipped for sellers' account), more or less, Aracan Necrensie rice * * * at 11*s.* 6*d.* for Necrensie, or at 11*s.* for Larong, the latter quantity not to exceed 50 tons." The cargo was found on arrival to consist of 285 tons of Larong and 159 tons of Latourie. And the plaintiffs alleged as the defendant's breach of contract, that the cargo was not Aracan Necrensie. But the Court of Exchequer was of opinion, that there was no absolute warranty that the rice which was shipped should be Araçan Necrenise, but was subject to the proviso that such a cargo should be shipped (*i*).

These cases may be contrasted with *Hale* v. *Rawson* (*k*), in 1858, which was an absolute contract to deliver, provided the ship should arrive, whether the goods were on board or not. The ship arrived, but with no goods on board, and the buyer brought this action for damages for not delivering goods according to contract. The sale was of 50 cases of East India tallow, to be delivered on the safe arrival of the *'Countess of Elgin.' The defendants [*491] pleaded that the ship had arrived without any tallow on board without any negligence on their part. The plaintiffs demurred, on the ground that the defendants had contracted to deliver unconditionally. The Court gave judgment for the plaintiff, saying that "where the agreement is absolute, or conditional on an event which "happens, the vendor will be liable for a breach, although he could "not help the non-performance (*l*)."

And it is for the person who wishes to avail himself of his rights which are dependent on the happening of a condition precedent to show that the condition has happened, or that the happening of it has been prevented by the opposite party.

(*f*) *Boyd* v. *Siffkin*, 2 Camp. 326.

(*g*) See *ante*, p. 231; and *Hawes* v. *Humble*, 2 Camp. 327, n.; *Idle* v. *Thornton*, 3 Camp. 274; *Johnson* v. *Macdonald*, 9 M. & W. 601; 12 L. J. Ex. 99; *Lovatt* v. *Hamilton*, 5 M. & W. 639.

(*h*) *Vernede* v. *Weber*, 1 H. & N. 311; 25 L. J. Ex. 326.

(*i*) See also *Smith* v. *Myers*, L. R. 5 Q. B. 429; L. R. 7 Q. B. 139; 39 L. J. Q. B. 210; 41 L. J. Q. B. 91, *ante*, p. 237; and other cases on conditions precedent.

(*k*) *Hale* v. *Rawson*, 4 C. B. N. S. 85; 27 L. J. C. P. 189.

(*l*) See also *Gorrissen* v. *Perrin*, 2 C. B. N. S. 681; 27 L. J. C. P. 29.

In *Atkinson* v. *Smith* (*m*), in 1845, the defendants had agreed to purchase from the plaintiffs 30 packs of Cheviot fleeces, and to accept a bill for 250*l.* and deliver to the plaintiff some coarse woollen clothes called noils. The plaintiff delivered a part only of the fleeces; and the Court held that the contracts were not independent, and that the plaintiffs could not sue the defendants for non-delivery of some of the noils, without proof of delivery or tender of the rest of the fleeces.

And in *Bankart* v. *Bowers* (*n*), in 1866, by agreement the plaintiff was to purchase certain lands and minerals from the defendant, and the defendant was to purchase from the plaintiff all the coal he might require from time to time at a fair market rate. The Court held that the acts were to be concurrent, and that the plaintiff could not sue the defendant for not taking the coals without performing his part of the agreement.

Having considered shortly the effect of express stipulations as to payment, delivery, &c., on the remedies of the parties, it is pro- [*492] posed now to consider in what way the parties may *assert their rights, and it will be convenient in the first place to consider the position of the vendee where the vendor does not tender the goods. The vendee may in some very exceptional cases compel the vendor to perform his contract specifically, that is to deliver those very goods; but generally speaking he cannot do so, the rule being that where damages will afford an adequate compensation for the breach, the vendee cannot get a decree for specific performance. Cases where specific performance has been decreed are so uncommon that it is sufficient here to refer to the case of *Cuddee* v. *Rutter* in White and Tudor's Leading Cases in Equity, Vol. I., where the learning on the subject will be found.

By section 2 of the Mercantile Law Amendment Act of 1856 (*o*), it was enacted that, "In all actions and suits for breach of contract "to deliver specific goods for a price in money, on the application "of the plaintiff, and by leave of the Judge before whom the cause "is tried, the jury shall, if they find the plaintiff entitled to re- "cover, find by their verdict what are the goods in respect of the "non-delivery of which the plaintiff is entitled to recover and which "remain undelivered; what (if any) is the sum the plaintiff would "have been liable to pay for the delivery thereof; what damages "(if any) the plaintiff would have sustained if the goods should be "delivered under execution, as hereinafter mentioned, and what "damages if not so delivered; and thereupon, if judgment shall be "given for the plaintiff, the Court or any Judge thereof, at their or "his discretion, on the application of the plaintiff, shall have power

(*m*) *Atkinson* v. *Smith*, 14 M. & W. 695; 15 L. J. Ex. 59. See also *Brodgen* v. *Marriott*, 2 Bing. N. C. 473, in 1836, 3 Bing. N. C. 88; *Thurnell* v. *Balbirnie*, 2 M. & W. 786, in 1837.

(*n*) *Bankart* v. *Bowers*, L. R. 1 C. P. 484.

(*o*) 19 & 20 Vict. c. 97.

"to order execution to issue for the delivery, on payment of such "sum (if any) as shall have been found to be payable by the plain- "tiff as aforesaid, of the said goods, without giving the defendant "the option of retaining the same upon paying the damages as- "sessed; and such writ of execution may be for the delivery of such "goods; and if such goods so ordered to be delivered, or any part "thereof, cannot be found, and unless the Court, or such Judge as "aforesaid, shall otherwise order, *the sheriff, or other of- [*493] "ficer of such Court of Record, shall distrain the defendant by all "his lands and chattels in the said sheriff's bailiwick, or within the "jurisdiction of such other Court of Record till the defendant de- "liver such goods; or, at the option of the plaintiff, cause to be "made of the defendant's goods the assessed value or damages, or "a due proportion thereof; provided that the plaintiff shall, either "by the same or a separate writ of execution, be entitled to have "made of the defendant's goods the damages, costs, and interest in "such action or suit."

The vendee's usual remedy where the vendor fails to deliver, is an action to recover damages from him for his failure to deliver according to contract: of this many examples will be found in the chapter on Conditions Precedent. By the third section of the Common Law Procedure Act of 1852 (*p*), it has become unnecessary to mention any form of action in the writ. Prior to that Act the writ stated whether the action was in trover or assumpsit, &c., and in reading the cases it is important to bear in mind that the plaintiff sometimes failed in one form of action where he would have succeeded if he had brought it in another. Such a case merely showed that that particular form of action would not lie.

If both parties are in default, then neither party can bring his action against the other, if the performance by each party of his own undertaking is in law a condition precedent to the obligation of the other party to perform his undertaking, as in *Atkinson* v. *Smith* (*q*), and *Bankart* v. *Bowers* (*r*). But where the contracts are independent, then either party may bring his action against the other for non-performance, although he has not performed his own part.

And if the price or any part of it has been paid, but the goods have not and should have been delivered, the money paid for the goods not delivered may be recovered back again.

*Thus in *Devaux* v. *Conolly* (*s*), in 1849, the plaintiffs in [*494] London agreed to purchase from the defendant at Singapore, 175 tons of terra japonica, and gave their acceptances for the price on receipt of the bills of lading. When it arrived and was weighed there were 20 tons short, and the Court held that the plaintiffs were

(*p*) 15 & 16 Vict. c. 76.
(*q*) *Atkinson* v. *Smith*, 14 M. & W. 695; 15 L. J. Ex. 59.
(*r*) *Bankart* v. *Bowers*, L. R. 1 C. P. 484.
(*s*) *Devaux* v. *Conolly*, 8 C. B. 640; 19 L. J. C. P. 71.

entitled to recover the amount overpaid as upon a partial failure of consideration.

Covas v. *Bingham* (*t*), in 1853, was an action in which the purchaser sought to recover a part of the purchase-money which he had paid, the bought note was, "Messrs. John Bingham and Co., I have this day sold to you, for account of Mr. Stamaty Covas, the cargo per 'Prima Donna' * * * now at Queenstown, as it stands, consisting of about thirteen hundred quarters Ibraila Indian corn, at the price of thirty shillings per imperial quarter * * * The quantity to be taken from the bill of lading." The quantity according to the bill of lading was 1667⅗ quarters, for which amount the plaintiffs paid. But when the ship was unloaded, there turned out to be only 1614⅓ qrs. on board, or about 53 qrs. less than the amount paid for. But the Court held that the purchaser was bound to pay for the quantity named in the bill of lading, and ran the risk of that quantity being more or less than the actual quantity on board.

And corresponding to this remedy is the vendor's right to sue the vendee for not accepting the goods; of this several examples will be found in the chapter on Conditions Precedent.

The case of *Chinery* v. *Viall* (*u*), in 1860, is an authority that the plaintiff cannot by suing in trover, get greater damages than by suing for damages for breach of contract. There the plaintiff had purchased from the defendant forty-eight sheep at fifty-three shillings each. He took away and paid for five of them, and some days afterwards he called for the remaining forty-three, and found that [*495] the *defendant had resold them. The plaintiff then brought this action against the defendant, declaring in trover in one count, and in another for not delivering the sheep, and recovered a verdict for 118*l.* 19*s.* the full value of the forty-three sheep on both counts. The jury also found that the actual damage sustained by the plaintiff was 5*l.* On the motion to reduce the verdict to 5*l.*, Bramwell, B., said, that the sheep had been resold before the vendee was in default, as it was a sale on credit, but that the plaintiff was not entitled to recover more in trover than the actual damage he had sustained, "the principle deducible from the authorities being that "a man cannot by merely changing the form of action entitle himself to recover damages greater than the amount to which he is in "law entitled, according to the true facts of the case, and the real "nature of the transaction. Here the result is that the plaintiff is "entitled to recover 5*l.* only (*x*)."

Having considered the position of the parties where the vendor has not tendered the goods, the next question is what are their rights where the vendor does tender. It will be convenient to examine in the first place those cases in which the property in the

(*t*) *Covas* v. *Bingham*, 2 E. & B. 836; 23 L. J. Q. B. 26.
(*u*) *Chinery* v. *Viall*, 5 H. & N. 288; 29 L. J. Ex. 180.
(*x*) See also *Johnson* v. *Lanc. and York Ry. Co.*, 3 C. P. D. 499.

goods has passed to the vendee. In that case he cannot return them. After accepting them so that the property in them has passed to him, he cannot, when he comes to examine them and discovers that they are not what he contracted for, call upon the vendor to take them back again. The law on this point was laid down in the leading case of *Street* v. *Blay* (*y*), in 1831, which has been followed in many cases. There the plaintiff sold a horse to the defendant with a warranty of soundness, the defendant resold it to Baily, who parted with it in exchange to Osborne, who sold it back to the defendant. The defendant then finding that the horse was unsound, returned it to the plaintiff. The horse was unsound at the time of the first sale. The Court held that the defendant could not compel the plaintiff to take back the horse, after having accepted it and resold it, which *were acts of ownership in- [*496] consistent with the purposes of a trial.

In *Parsons* v. *Sexton* (*z*), in 1847, the vendor sued for the price of an engine sold in the following circumstances. The engine had been erected, and subsequently taken to pieces, and was lying in the plaintiffs' works, where the defendants' foreman saw and examined it. The plaintiff then made an offer to sell it as follows: "I, James Parsons, do hereby agree to provide a fourteen-horse engine, and sixteen-horse boiler with fittings and everything complete, for the sum of 260*l*." The defendants accepted on the terms following: "In consideration of your supplying us with a certain fourteen-horse engine which our foreman has inspected, &c." The engine was delivered at the defendants' works, but the plaintiff was unable to make it work up to fourteen horse-power, and the defendants rejected it. It was held that, assuming there was a warranty as to power, and that there was a breach of it, that that was not an answer to a claim for the price, although it might be the ground of a set-off or cross-action.

And in *Dawson* v. *Collis* (*a*), in 1851, the sale was of 31 pockets of hops warranted equal to sample, the Court held that on the sale of a specific chattel the buyer cannot refuse to accept it because it is found not to correspond with the sample.

In delivering judgment in *Behn* v. *Burness* (*b*), in 1863, Williams, J., said, "Accordingly, if a specific thing has been sold with a war-"ranty of its quality, under such curcumstances that the property "passes by the sale, the vendee having been thus benefited by the "partial execution of the contract, and become the proprietor of "the thing sold, cannot treat the failure of the warranty as a con-"dition broken (unless there is a special stipulation to that effect "in the contract, see *Bannerman* v. *White* (*c*), but must have re-

(*y*) *Street* v. *Blay*, 2 B. & Ad. 456.
(*z*) *Parsons* v. *Sexton*, 4 C. B. 899; 2 C. &. K. 266.
(*a*) *Dawson* v. *Collis*, 10 C. B. 523; 20 L. J. C. P. 116.
(*b*) *Behn* v. *Burness*, 3 B. & S. 755; 32 L. J. Q. B. 204.
(*c*) *Bannerman* v. *White*, 10 C. B. N. S. 844; 31 L. J. C. P. 28, next page.

[*497] "course to an action for damages in respect of the *breach "of warranty. But in cases where the thing sold is not specific, "and the property has not passed by the sale, the vendee may re-"fuse to receive the thing proffered him in performance of "the contract, on the ground, that it does not correspond with "the descriptive statement, or in other words, that the condition "expressed in the contract has not been performed. Still, if he re-"ceives the thing sold, and has the enjoyment of it, he cannot af-"terwards treat the descriptive statement as a condition, but only as "an agreement, for a breach of which he may bring an action to "recover damages."

In *Bannerman* v. *White* (*d*), in 1861, where the vendor sued for the moiety of the price of hops delivered, which corresponded with the sample, but in the cultivation of them sulphur had been used, although at the time of the sale the plaintiff had stated that sulphur had not been used, and it was admitted that the defendant would not have bought the hops if he had known this, the Court held that he might refuse to pay the price, as the intention of the parties was that if sulphur had been used there should be no contract. It was the condition upon which the defendant contracted.

When the vendee has accepted the goods, and subsequently finds that there has been a breach of warranty, or in other words, that the goods delivered are not in all respects what the vendee contracted for, then, although he cannot return them and revest the property in the vendor, he may bring an action for breach of warranty. And if he has not yet paid for them, he may wait until the vendor sues him for the price, and then set off the vendor's breach as matter in reduction of the vendor's claim.

In *Pateshall* v. *Tranter* (*e*), in 1835, where the purchaser kept a horse, warranted sound, for several months, without notifying to the vendor that it was unsound, it was held that he had not lost his right to sue on the warranty (*f*).

[*498] *In *Shepherd* v. *Kain* (*g*), in 1821, the defendant sold the plaintiff "a copper-fastened vessel," "as she now lies, to be taken with all faults, without allowance for any defects whatsoever." She was in fact only partially copper-fastened, and was not what was known in the trade as a copper-fastened vessel, but the plaintiff had a full opportunity to examine her before buying her. The plaintiff brought this action for breach of warranty, instead of rejecting the ship, as he probably might have done, and obtained a verdict, which the Court refused to set aside, on the ground that "with all faults" meant will all faults consistent with the ship being a copper-fastened ship, whereas she was not a copper-fastened ship at all.

(*d*) *Bannerman* v. *White*, 10 C. B. N. S. 844, 31 L. J. C. P. 28.

(*e*) *Pateshall* v. *Tranter*, 3 Ad. & El. 103.

(*f*) See also *Fielder* v. *Starkin*, 1 H. Bl. 17; *Buchanan* v. *Parnshaw*, 2 T. R. 745.

(*g*) *Shepherd* v. *Kain*, 5 B. & Ald. 240.

Taylor v. *Bullen* (*h*), in 1850, was a case very similar to *Shepherd* v. *Kain* (*g*). The sale was of a vessel as she lay, with all faults, but the defendant, who was the vendor, had stipulated that no allowance should be made for "any defect or error whatever." The Court held that there was no warranty, and gave judgment for the defendant, on the ground that if the vessel was not what she was warranted, the vendor had either committed a fraud or an error; if a fraud, the plaintiff had another remedy; if merely an error, the defendant's liability was excluded by the terms of the contract.

In *Allan* v. *Lake* (*i*), in 1852, the defendant had sold turnip seed, which he warranted to be Skirving's Swedes. The seed turned out not to be such, and the plaintiff obtained a verdict for breach of warranty, which the Court upheld. Erle, C.J., said :—"When the vendor gives a description of the properties of an article, it is a question for the jury whether such a description is a mere commendation of the article, or a direct representation that he sells it as being the particular article described."

And in *Wieler* v. *Schilizzi* (*k*), in 1856, the sale was of "Calcutta linseed tale quale," but the seed was found to contain fifteen per cent. of seeds which were not linseed. The *question left to [499] the jury was, whether there was such an admixture as to alter the distinctive character of the article, and the jury found a verdict for the plaintiff. This was held to be no misdirection.

Simond v. *Braddon* (*l*), in 1857. The contract was :—"Bought for account of, &c., the following cargo of Arracan rice, per 'Severn,' &c. The cargo to consist of fair average Nicranzi rice, the price of which is to be 11*s.* 6*d.* per cwt., with a fair allowance for Larong, or any other inferior description of rice (if any), but the seller engages to deliver what is shipped on his account, and in conformity with his invoice." The jury found that the rice delivered was not fair average Nicranzi rice, and the plaintiff obtained a verdict, which the Court upheld.

Cockburn, C.J., said that the contract amounted "to a warranty on the part of the seller that the cargo should consist of fair average Nicranzi rice, with a stipulation, introduced for the benefit of the buyer, that he may, if he chooses, take the cargo, such as it is, and claim a deduction in price for the inferior quality" (*m*).

And in *Davis* v. *Hedges* (*n*), in 1871, it was decided by Hannen, Blackburn, and Lush, JJ., that the vendee is not bound to set off his damages when sued for the price, but may pay the full amount of

(*h*) *Taylor* v. *Bullen*, 5 Ex. 779; 20 L. J. Ex. 21.
(*i*) *Allan* v. *Lake*, 18 Q. B. 560.
(*k*) *Wieler* v. *Schilizzi*, 17 C. B. 619; 25 L. J. C. P. 89.
(*l*) *Simond* v. *Braddon*, 2 C. B. N. S. 324; 26 L. J. C. P. 198.
(*m*) See also *Josling* v. *Kingsford*, in 1863, *ante*, p. 210; 13 C. B. N. S. 447; 32 L. J. C. P. 94.
(*n*) *Davis* v. *Hedges*, L. R. 6 Q. B. 687; 40 L. J. Q. B. 276; *Broom* v. *Davis*, cited 7 East, 480; *Cormack* v. *Gillis*, cited 7 East, 481.

the vendors' claim, and is not prejudiced by having so done when he brings his action against the vendor for breach of warranty.

The leading case on the subject that the vendee may set off his damages, in an action for the price by the vendor, is *Mondel* v. *Steel* (*o*), in 1841. Parke, B., in delivering judgment, said :—" Formerly " it was the practice, where an action " was brought for an agreed " price, of a specific chattel sold with a warranty, or of work which [*500] " was to be performed *according to contract, to allow the " plaintiff to recover the stipulated sum, leaving the defendant to a " cross action for breach of the warranty or contract; in which ac " tion, as well the difference between the price contracted for and " the real value of the articles or of the work done, as any conse- " quential damage might have been recovered; and this course was " simple and consistent. But after the case of *Basten* v. *Butter* " (*p*), a different practice, which had been partially adopted before " in the case of *King* v. *Boston* (*q*), began to prevail, and being at- " tended with much practical convenience, has been since generally " followed; and the defendant is now permitted to show that the " chattel, by reason of the non-compliance with the warranty in the " one case, and the work, in consequence of the non-performance " of the contract in the other, were diminished in value. It must be " considered, that in all these cases of goods sold and delivered " with a warranty, and work and labour, as well as the case of " goods agreed to be supplied according to a contract, the rule " which has been found so convenient is established, and it is com- " petent for the defendant, in all of those, not to set off, by a pro- " ceeding in the nature of a cross-action, the amount of damages " which he has sustained by breach of the contract, but simply to " defend himself by showing how much less the subject-matter of " the action was worth, by reason of the breach of contract; and " to the extent that he obtains, or is capable of obtaining, an abate- " ment of the price on that account, he must be considered as hav- " ing received satisfaction for the breach of contract, and is pre- " cluded from recovering in another action to that extent, but no " more."

If the contract was not a sale of an ear-marked chattel, and was an executory one so that the property in the goods did not pass at the time of the contract, then the vendee may refuse to accept them when tendered, if they are not such as the vendor warranted they [*501] should be. If he accepts them, *then, as before, he cannot return them, but has his remedy in an action for damages. It may become a question whether the vendee has accepted the goods, and in cases of sale by sample there is no acceptance until the vendee has inspected the bulk and found it to correspond with the sample; and if, through the acts of the vendor, the inspection is an illusory

(*o*) *Mondel* v. *Steel*, 8 M. & W. 858; 10 L. J. Ex. 426.
(*p*) *Basten* v. *Butter*, 7 East, 479.
(*q*) *King* v. *Boston*, 7 East, 481, n.

one, the vendee may treat it as no inspection at all, as in the case of *Heilbutt* v. *Hickson* (*r*).

The vendee may decline to accept or pay for the goods when tendered, if there is any condition precedent to his obligation to do so which has not been performed. Many examples of this will be found in the chapter on Conditions Precedent.

There are two *dicta* in *Shipton* v. *Casson* (*s*) and in *Oxendale* v. *Wetherell* (*t*), that where a vendor fails to deliver the whole quantity contracted for, the purchaser may return the part received as soon as the time for delivering is past; but it seems more than doubtful, on principle, whether he could do so if the property had passed to him, in the absence of some agreement, express or implied.

It is now well settled that in the sale of goods, specific at the time of the sale, that is ear-marked or identified as the subject-matter of the sale, the vendee cannot put the breach of a warranty on the same footing as an unperformed condition precedent. He cannot decline to accept ear-marked goods, on the ground that they are not as good as those contracted for. Where the goods were ear-marked at the time of the contract, the stipulation as to quality is not a condition precedent uncomplied with, and as such entitling the vendee to reject the goods, but a warranty merely, for the breach of which the vendee may obtain damages. Although, as will be afterwards seen, the law is otherwise in cases where the goods were not specific or ear-marked at the time of the contract. The following extract is from Smith's *Leading Cases (*u*), and [*502] states the learned authors' view of the law on the subject with great clearness. "A warranty, properly so called, can only exist "where the subject-matter of the sale is ascertained and existing, "so as to be capable of being inspected at the time of the contract, "and is a collateral engagement that the specific thing so sold pos-"sesses certain qualities, but the property passing by the contract "of sale, a breach of the warranty cannot entitle the vendee to re-"scind the contract and revest the property in the vendor without "his consent. * * * But where the subject-matter of the sale "is not in existence, or not ascertained at the time of the contract, "an engagement that it shall, when existing or ascertained, possess "certain qualities, is not a mere warranty, but a condition, the per-"formance of which is precedent to any obligation upon the vendee "under the contract, because the existence of those qualities being "part of the description of the thing sold becomes essential to its "identity, and the vendee cannot be obliged to receive and pay for "a thing different from that for which he contracted."

And Mr. Benjamin, in his Treatise on Sales (*x*), says:—"The

(*r*) *Heilbutt* v. *Hickson*, L. R. 7 C. P. 438; 41 L. J. C. P. 228.
(*s*) *Shipton* v. *Casson*, 5 B. & C. 378, in 1826.
(*t*) *Oxendale* v. *Wetherell*, 9 B. & C. 386, in 1829.
(*u*) Smith's Leading Cases, 6th ed., Vol. II., p. 27.
(*x*) 2nd ed., p. 749.

"same reasoning which applies to a thing not yet existing, or not "yet ascertained, would seem equally applicable to goods in a "distant country, or on the high seas, beyond the possible reach of "the buyer's inspection."

The case of *Heyworth* v. *Hutchinson* (*y*), in 1867, is a very instructive one on this point. The defendant bought 413 bales of wool, to arrive ex 'Stige,' at 10¼*d.* a pound. "The wool to be guaranteed about similar to samples, and if any dispute arises it shall be decided by the selling broker, whose decision shall be final." When the wool arrived at Liverpool, 180 bales turned out to be worth 2*d.* a pound less than the sample, and 201 bales 1¼*d.* a pound less, and 32 bales ½*d.* a pound. The brokers decided that the [*503] defendant should take *the bales at the reduced prices. The defendants contended that they might decline to accept the wool, as not being about similar to sample. The Court, consisting of Cockburn, C.J., Blackburn, Shee, and Lush, J.J., held that this was a sale of specific wool, with a warranty that the quality was similar to sample, and that the defendants could not reject it, but might bring a cross-action on the warranty, or give the inferiority in evidence in reduction of damages. Blackburn, J., said:—"The "wools are guaranteed about similar to samples. Now, such a "clause may be a simple guarantee or warranty, or it may be a "condition. Generally speaking, when the contract is as to any "goods, such a clause is a condition going to the essence of the "contract; but when the contract is as to specific goods, the clause "is only collateral to the contract, and is the subject of a cross-action, "or matter in reduction of damages, according to the case of *Mon-*"*dell* v. *Steel* (*z*). Here there is, I think, merely a warranty, as "distinguished from a condition."

And in the subsequent case of *Azemar* v. *Casella* (*a*), Lord Blackburn said of *Heyworth* v. *Hutchinson* (*y*), that the wool which arrived was of the same kind or character, but inferior only in quality. It is somewhat difficult to reconcile the two cases of *Toulmin* v. *Hedley* (*b*), and *Heyworth* v. *Hutchinson* (*y*), but possibly in the latter case the stipulation that the brokers should decide disputes may have had some weight.

If the vendee has the right to refuse to accept the goods, as where there is some condition precedent not complied with, or the ordinary case of goods delivered on sale or return (*c*), he must do so in a reasonable time and unequivocally, and he must return them in the same condition as that in which he purchased them. If after a reasonable trial he finds the goods are not up to sample, or not

(*y*) *Heyworth* v. *Hutchinson*, L. R. 2 Q B. 447.
(*z*) *Mondell* v. *Steel*, 8 M. & W. 858; 10 L. J. Ex. 426.
(*a*) *Azemar* v. *Casella*, L. R. 2 C. P. 341 and 677; 36 L. J. C. P. 124 and 263.
(*b*) *Toulmin* v. *Hedley*, *ante*, p. 207; 2 C. & K. 157.
(*c*) *Moss* v. *Sweet*, in 1851, 16 Q. B. 493; 20 L. J. Q. B. 167; *Parker* v. *Palmer*, 4 B. & Ald. 387; *Richardson* v. *Dunn*, 2 Q. B. 318.

what he approves of, he may tell *the vendor so, who must [*504] take the goods away, and they remain at the vendor's risk until he does so (*e*).

In *Chapman* v. *Morton* (*f*), in 1843, the plaintiffs in Dieppe agreed to sell to the defendant at Wisbech, a quantity of oil cake: the defendant accepted bills for the cake before its arrival at Wisbech in December. On its arrival he complained to the plaintiffs that it was not up to the sample, and subsequently, on the 24th of January, wrote to them that it was lying at the public granery at their risk, and requesting them to take it back, which the plaintiffs declined to do. In May, the defendant again wrote, saying he would sell the cake, and apply the proceeds in part satisfaction of the damages; and in July, advertised it for sale in his own name, and sold it. The Court held that the defendant had accepted the cake, and Lord Abinger, C.B., said: "We must judge of men's intentions "by their acts, and not by expressions in letters, which are con-"trary to their acts. If the defendant intended to renounce the "contract, he ought to have given the plaintiffs distinct notice at "once that he repudiated the goods, and that on such a day he "should sell them by such a person, for the benefit of the plaintiffs. "The plaintiffs could then have called upon the auctioneer for the "proceeds of the sale. Instead of taking this course, the defendant "has exposed himself to the imputation of playing fast and loose; "declaring in his letters that he will not accept the goods, but at "the same time preventing the plaintiffs from dealing with them as "theirs."

In *Harnor* v. *Groves* (*g*), in 1855, the plaintiff agreed to buy twenty-five sacks of flour from the defendant, for which he paid. After using half a sack, he complained that the flour was not as good as he contracted for; he then used two more sacks, and sold another. The Court held that he had dealt with the flour in such a manner as to preclude him from returning it.

*In *Lucy* v. *Mouflet*, (*h*), in 1860, the action was brought to [*505] recover the price of a hogshead of cider, purchased by the defendant, an innkeeper, from the plaintiff. On the 28th of May, the defendant had written to the plaintiff, saying that he had tapped the cider and found it inferior to the sample, and that if his customers continued to complain, he should be obliged to return it. To this the plaintiff returned no answer, and the defendant again complained by letter on the 21st of June, and on the 24th of June, wrote to the plaintiff to take it away. At that time about twenty gallons had been consumed, and the Court held that the plaintiff's omission to answer the letter, amounted under the circumstances, to

(*e*) *Okell* v. *Smith*, in 1815, 1 Stark. 107; *Cook* v. *Riddelieu* in 1844, 1 Car. & Kir. 561.

(*f*) *Chapman* v. *Morton*, 11 M. & W. 534; 12 L J. Ex. 292.

(*g*) *Harnor* v. *Groves*, 15 C. B. 667; 24 L. J. C. P. 53.

(*h*) *Lucy* v. *Mouflet*, 5 H. & N. 229; 29 L. J. Ex. 118.

an acquiescence in the defendant's endeavour to make a further trial of the cider.

The case of *Couston* v. *Chapman* (*i*), in 1872, arose out of a purchase of wine at an auction. The purchaser, who complained that it was not up to sample, kept it for a greater time than the Court considered reasonable, and he was held liable to pay for it.

In *Grimoldy* v. *Wells* (*k*), in 1875, the plaintiff sold four quarters of tares to the defendant by sample. They were sent to the defendant, part of way in the plaintiff's cart and the remainder in the defendant's cart. The defendant examined them at once in his barn and finding they were not up to sample, stated that he would not keep them, and that the plaintiff might do what he liked with them.

The plaintiff brought this action to recover the price, contending that if the defendant did not mean to accept the goods, he was bound to return them. But the Court held that this view was incorrect. Brett, J., said: "I think that when there is a sale by sam-"ple, and the time for inspection is subsequent to delivery, and the "place of inspection different from that of delivery, then if the "goods are found on such inspection not to be equal to sample, the [*506] "purchaser has a *right to reject them then and there, and "it is the duty of the vendor to get them back thence."

Head v. *Tattersall* (*l*), in 1871, is an authority, that although the general rule is that the vendee's right to return the goods is gone if he is unable to return them in the same condition in which they were delivered to him, that rule is subject to the qualification that his right is not affected by any of those incidents which may befall the goods either from their nature, or in the course of the exercise by him of those rights over them which the contract gave. A horse was purchased on Monday, and a condition of the sale was that the horse might be returned on the following Wednesday if it did not correspond with the warranty. On the way home, and without any negligence on the part of the plaintiff, the horse hurt itself seriously against the splinter-bar of a carriage, and the plaintiff returned it before Wednesday evening. The Court consisting of Kelly, C.B., Bramwell, and Cleasby, BB., held that he had the right to return it, notwithstanding its damaged state, and to recover the price paid.

Elphick v. *Barnes* (*m*), in 1880, was a case resembling the preceding one. A horse was sold to the defendant on condition that he should try him for eight days, and be at liberty to return him at the end of that time if he did not suit. The horse died on the third day, and it was held that the plaintiff could not maintain an action for the price. In *Ray* v. *Barker* (*n*) the return was pre-

(*i*) *Couston* v. *Chapman*, L. R. 2 Sc. App. 250.
(*k*) *Grimoldy* v. *Wells*, L. R. 10 C. P. 391; 44 L. J. C. P. 202.
(*l*) *Head* v. *Tattersall*, L. R. 7 Ex. 7; 41 L. J. Ex. 4.
(*m*) *Elphick* v. *Barnes*, 5 C. P. D. 321; 49 L. J. C. P. 698.
(*n*) *Ray* v. *Berker*, 4 Ex. D. 282; 48 L. J. Ex. 569.

vented by the act of a third party, and although there was no decision on the point, the opinion of the Court seems to be that it was no excuse.

Several of those cases which decide that one party is not bound to receive the goods when tendered, are also authorities for the converse,—viz., that where he would not be bound to receive any particular goods if tendered, there he cannot compel the other party to deliver them. If one party *is not bound to receive, the [*507] other party cannot, in the absence of an agreement to that effect, be compelled to deliver.

Thus, in the case of *Lovatt* v. *Hamilton* (*o*), in 1839, the purchaser brought an action against the vendor for not delivering. The sale was of fifty tons of palm oil "to arrive *per* 'Mansfield.'" Only seven tons arrived. And the Court held that the contract for the fifty tons was entire, and that the plaintiffs were not entitled to the seven tons which did arrive.

And in *Vernede* v. *Weber* (*p*), in 1856, the contract was to deliver a cargo of 400 tons of Aracan Necrensie rice more or less, which cargo by agreement might partly consist of Larong rice, but not to a greater extent than fifty tons. The cargo was found to consist of 285 tons of Larong and 159 tons of Latourie. And the Court held that the plaintiffs were not entitled to have any of the rice delivered to them. "We think," said Anderson, B., delivering judgment for himself and Martin, B., "it would have been impossible for the de-"fendant to have insisted upon the plaintiffs accepting a cargo con-"sisting only of a minute portion of Aracan Necrensie rice; for un-"less the cargo was what would substantially satisfy the description "of a cargo of Aracan Necrensie rice, we think that the plaintiffs "could not have been bound to accept." * * * "And if the "plaintiff would not have been bound to accept the cargo brought, "the defendant was not obliged to deliver it, for the contract must "be mutual and reciprocal."]

(*o*) *Lovatt* v. *Hamilton*, 5 M. & W. 639, *ante*, p. 231.
(*p*) *Vernede* v. *Weber*, 1 H. & N. 311; 25 L. J. Ex. 326, *ante*, p. 490.

[*508] *CHAPTER IV.

WHAT DAMAGES MAY BE RECOVERED WHERE THERE HAS BEEN A BREACH OF CONTRACT.

[WHEN either party breaks the contract the other has a right to recover damages, but it does not follow that he can recover the whole of the loss he has suffered in consequence of that breach. The question is, what are the damages to the plaintiff caused by the defendant's breach which the law will allow the plaintiff to recover? The leading case on this subject is *Hadley* v. *Baxendale* (*a*), which although not a case of sale of goods, but of late delivery by a carrier, is a most important one in consequence of the Judges of the Exchequer Court having there laid down certain rules of general application to breaches of contract.

In *Hadley* v. *Baxendale* (*a*), in 1854, the plaintiffs were millers at Gloucester. On the 12th of May the engine shaft in their mill had to be removed in consequence of a fracture, and on the 13th the plaintiffs sent a servant to the defendants, who were carriers, to say that the mill was stopped, and that the shaft must be sent at once to Greenwich, to be used there as a pattern in making a new one. The defendants said that if the shaft was sent by 12 o'clock the next day it would be delivered at Greenwich on the following day. Accordingly the shaft was delivered to the defendants before 12 o'clock on the 14th, but was not delivered by them at Greenwich till several days later, and the consequence was that the new shaft was not delivered at the mill as soon as it otherwise would have been; the working of the mill was delayed and the profits on the working were lost, and other expenses incidental to the stoppage were incurred, for all of which the plaintiffs sought [*509] to hold the defendants liable, but failed. *Alderson, B., in delivering the judgment of the Exchequer Court said, "Now we "think the proper rule in such a case as the present is this:—Where "two parties have made a contract which one of them has broken, "the damages which the other party ought to receive in respect of "such breach of contract should be such as may fairly and reason-"ably be considered either arising naturally, *i. e.*, according to the "usual course of thing, from such breach of contract itself, or such "as may reasonably be supposed to have been in the contemplation "of both parties, at the time they made the contract, as the probable "result of the breach of it. Now, if the special circumstances under "which the contract was actually made were communicated by the

(*a*) *Hadley* v. *Baxendale*, 9 Ex. 341; 23 L. J. Ex. 179.

"plaintiffs to the defendants, and thus known to both parties, the dam-"ages resulting from the breach of such a contract, which they would "reasonably contemplate, would be the amount of injury which would "ordinarily follow from a breach of contract under these special "circumstances so known and communicated. But, on the other "hand, if these special circumstances were wholly unknown to the "party breaking the contract, he, at the most, could only be sup-"posed to have had in his contemplation the amount of injury "which would arise generally, and in the great multitude of cases "not affected by any special circumstances, from such a breach of "contract, for, had the special circumstances been known, the parties "might have specially provided for the breach of contract by special "terms as to the damages in that case; and of this advantage it "would be very unjust to deprive them. Now in the present case, if "we are to apply the principles above laid down, we find that the "only circumstances here communicated by the plaintiffs to the de-"fendants at the time the contract was made, were that the article "to be carried was the broken shaft of a mill. But how do these "circumstances show reasonably that profits of the mill must be "stopped by an unreasonable delay in the delivery of the broken "shaft by the carrier to the third person? Suppose the plaintiffs "had another shaft in their possession put up *or putting [*510] "up at the time, and that they only wished to send back the broken "shaft to the engineer who made it; it is clear that this would be "quite consistent with the above circumstances, and yet the unrea-"sonable delay in the delivery would have no effect upon the inter-"mediate profits of the mill." And after pointing out that although in the special circumstances of the the case the loss did arise from the defendant's neglect, he proceeded, "these special circum-"stances were here never communicated by the plaintiffs to the de-"fendants. It follows, therefore, that the loss of profits here can-"not reasonably be considered such a consequence of the breach of "contract as could have been fairly and reasonably contemplated "by both the parties when they made this contract. For such loss "would neither have flowed naturally from the breach of this con-"tract in the great multitude of such cases occurring under ordi-"nary circumstances; nor were the special circumstances, which, "perhaps, would have made it a reasonable and natural conse-"quence of such breach of contract, communicated to, or known by "the defendants."

This case has since been followed in cases too numerous to be referred to; and the reader is referred for fuller information on the subject to Mr. Mayne's work on Damages.

In the case of *Gee* v. *The Lancashire and Yorkshire Railway Co.* (*b*), in 1860, a very important remark was made by Bramwell, B., who, while delivering judgment, referred to the rule in *Hadley* v.

(*b*) *Gee* v. *Lanc. & York. Ry. Co.*, 6 H. & N. 211; 30 L. J. Ex. 11.

Baxendale (*c*), that damages to be recoverable must be such as the parties must be taken to have contemplated as the probable result of the breach, and said: "I am not sure that another qualification "might not be added which would be in favour of the plaintiff in "this case, viz., that in the course of the performance of the con-"tract, one party may give notice to the other of any particular "consequences which will result from the breaking of the contract, "and then have a right to say, 'If after that notice, you persist [*511] *"'in breaking the contract, I shall claim the damages which "'will result from the breach'" (*d*).

In the case of a sale of goods, the vendor's breach may consist in his having delivered to the vendee an article of less value than the article which should have been delivered, and there the difference in value is the measure of the damages; or the breach may have consisted in the failure to deliver any goods at all, and in this case instead of the damages being a difference in value as in the first one, they are what the vendee must pay to obtain the goods in the market, or if necessary from some other quarter. But by reason of having such an inferior article or nothing at all delivered to him, the vendee may suffer much greater damages than the difference in value, or the full value, and then the question becomes, are those greater damages such as the parties at the date of the contract must be taken to have contemplated as the probable result of the breach? Or the vendor's breach may consist in the unpunctual delivery of the goods.

On the other hand, the vendee may have been the party to break the contract, as by refusing to accept the goods when tendered. Here the vendor may by reselling the goods, put himself in the position in which the vendee had contracted to put him, and charge the vendee with costs reasonably incurred in doing so; but he may be unable to resell them, and he may then give evidence of any loss he has suffered; and if that loss is such as the parties must be taken to have contemplated, he may recover it.

From these considerations it appears that the value of the thing contracted to be delivered, and of that which was delivered, on the day fixed for delivery, are important considerations. Now the best possible evidence of the value of a thing is what it did or would fetch in the market, or what must have been paid for it if it had been bought there; but if the thing has no market price, then some other evidence of value must be obtained. And the price at which the vendee either agreed to resell it in the ordinary course of busi-[*512] ness, or the *price which by the contract he had agreed to pay for it, may then be the best evidence obtainable (*e*). But except where the price at which the vendee agreed to buy or to sell the

(*c*) *Hadley* v. *Baxendale*, 9 Ex. 341; 23 L. J. Ex. 179.

(*d*) See also *Simpson* v. *L. & N. W. Ry. Co.*, 1 Q. B. D. 274; and *Horne* v. *M. R. Co.*, L. R. 7 C. P. 583.

(*e*) *Heilbutt* v. *Hickson*, L. R. 7 C. P. 455; 41 L. J. C. P. 228.

goods is evidence of value, that price has nothing whatever to do with the damages of either party; the vendee is entitled to have in his hands, on the day fixed for delivery, goods which at that date have a certain value; the price which he may have contracted to pay may be more or less than they are worth on that day, but the value on that day is what the contract gives him, and therefore it is all that he can charge the vendor with. For example, if the market price fell after the date of the contract, that is a loss which by the contract must fall on the vendee in any case and cannot be charged to the vendor, even if the vendor fails to perform his contract. If on the other hand the market price rises after the date of the contract, that is a gain to the vendee which the contract gives him, and which he loses by the vendor's breach, and which the vendor is liable to pay.

A loss of profits on a resale cannot be recovered as such. Where a vendee resells at a profit, but in consequence of the vendor's breach is unable to deliver and so loses his profit, the reselling price is not an element in the calculation of damages except in those cases where the reselling price is taken as the best evidence of value.

If the goods are procurable in the market, the loss was in fact, not due to the defendant's breach but to the plaintiff not having bought in, and if it was not so due, then it clearly could not be recovered, but where it is in fact the result of the defendant's breach, and the parties had the resale in contemplation, there seems no reason why it should not be recovered as such.

In *Cassaboglou* v. *Gibbs* (*f*), in 1882, a principal instructed his agent abroad to buy and consign to him opium of a certain quality. The agent sent over opium of an inferior quality, and the Court held that the damages were not the difference *in value as [*513] they would have been if it had been a case of vendor and purchaser, but merely the loss actually sustained.

Having now considered what the facts are which it is important to ascertain before the damages can be calculated, it will be desirable to examine the cases, taking firstly, those cases where the market has been referred to as the test of value; secondly, those cases where there was no market to refer to, dividing the latter into two classes, one, where the breach was as to quality, the other where the breach was as to time; and thirdly, certain exceptional cases.

The general rule is, that interest cannot be recovered, but the discussion of this subject is left until the authorities are examined in detail (*g*).

In *Leigh* v. *Paterson* (*h*), in 1818, the defendants contracted to sell tallow to the plaintiffs "in all next December." In October

(*f*) *Cassaboglou* v. *Gibbs*, L. R. 9 Q. B. D. 220; 11 Q. B. D. 797; 51 L. J. Q. B. 593; 52 L. J. Q. B. 538.

(*g*) *Post*, p. 532.

(*h*) *Leigh* v. *Paterson*, 2 Moo. 588. See also *Gainsford* v. *Carroll*, 2 B. & C. 624, in 1824.

they said they had resold the tallow, and could not perform their contract. The plaintiff did not acquiesce in the rescission of the contract, and recovered the difference between the contract and the market price on the 31st of December, the last day for delivery.

In *Startup* v. *Cortazzi* (*i*), in 1835, the defendants in June contracted to sell to the plaintiffs 2,100 qrs. of Odessa linseed, at 30*s.* a quarter, to be shipped on board the plaintiffs' ship at Odessa in October. The plaintiffs sent their ship there, but she was not loaded, as the defendant had given notice that he would not fulfill his contract. The defendant had already received 1,575*l.* as half the price. If the linseed had been delivered at Odessa it would have arrived in February, when its value in the market would have been from 47*s.* to 48*s.* a qr. At the time of the trial it was about 56*s.* The defendant paid into Court at the rate of about 47*s.* a qr. The plaintiffs contended that they were entitled to higher damages: there was no evidence of any special damage, and the jury [*514] found a verdict for the defendant. Lord Abinger *seems to have considered the measure of damages to have been the difference between the price at the time when the seed would have arrived here and the contract price. Alderson, B., thought the price at the time when the defendant gave notice he would not perform the contract was not the criterion, for at that time the plaintiffs had parted with their money and could not go into the market, and that the price when it should have arrived if delivered according to contract was a better criterion. This case does not appear to be well reported.

In *Phillpotts* v. *Evans* (*k*), in 1839, the defendant, who had contracted early in January to purchase corn from the plaintiff, gave notice on the 26th of that month of his intention not to accept it. The corn was then on its way to the place of delivery, and the market was falling. The corn when it arrived was tendered to the defendant and refused. The only question argued was, whether the damages were to be calculated as the difference between the contract price and the market price on the 26th of January, when the defendant gave his notice, or at the date when the defendant ought to have received the goods, and the latter was held to be the true measure.

In *Loder* v. *Kekulé* (*l*), in 1857, the plaintiff had contracted to purchase from the defendant 200 casks of tallow, for which he paid at once; the unloading of the cargo began on the 16th of January and was finished on the 25th. The plaintiff having inspected it, wrote to the defendant on the 28th, saying that 184 of the casks were not according to contract, and declined to accept them, and requested the defendant to return the purchase-money; a correspondence followed, and eventually the plaintiff resold the tallow on

(*i*) *Startup* v. *Cortazzi*, 2 Cr. Mec. & Ros. 165.
(*k*) *Phillpotts* v. *Evans*, 5 M. & W. 474.
(*l*) *Loder* v. *Kekulé*, 3 C. B. N. S. 128; 27 L. J. C. P. 27.

the 12th of March. The price of tallow had fallen, and the Court held that the measure of damages would have been the difference between the value of tallow of the quality contracted for and the value of that delivered at the time of the delivery, *provided there [*515] could have been an immediate resale in the market, but that in this case the defendant had delayed the resale, and that as the jury had found the resale was within a reasonable time, the damages were the difference between the market value of the quality contracted for at the time of delivery and the price obtained on resale, and not the difference between the amount prepaid and price obtained on resale.

In *Josling* v. *Irvine* (*m*), in 1861, the defendant sold 3,000 gallons of naphtha to the plaintiff, at 2*s.* 2*d.* a gallon, to be delivered in weekly instalments of 1,000 gallons; the day after the sale the plaintiff resold them to Hoile at 2*s.* 6*d.* a gallon. The defendant refused to deliver any of the naphtha. It was proved that at the time of the breach naphtha could not have been bought for less than 5*s.* 9*d.* a gallon. Held, that as the plaintiff would have no answer to an action by Hoile for the difference between 5*s.* 9*d.* and 2*s.* 6*d.*, that was the amount the plaintiff was entitled to recover from the defendant. The amount that the plaintiff was entitled to recover as his damages was not his loss of profits, viz., the difference between 2*s.* 2*d.* and 2*s.* 6*d.*, but his liability on his second contract, viz., the difference between 2*s.* 6*d.*, the selling price, and 5*s.* 9*d.*, the market price. Why they were not the difference between 2*s.* 2*d.* and 5*s.* 9*d.* does not appear.

In *Williams* v. *Reynolds* (*n*), in 1865, the plaintiff purchased from the defendants on the 1st of April, 500 piculs of China cotton at 16¾*d.* per lb., to be delivered in August, guaranteed fair. On the 25th of May the plaintiffs made a contract to sell to a third party the same quantity and quality of cotton at 19¾*d.* per lb., intending to deliver the same cotton which the defendants had contracted to deliver to them. At the end of August, the latest time for delivery under both contracts, the price of such cotton was 18¼*d.* per lb. The Court of Queen's Bench held that the damages to which the plaintiff was entitled was the difference between 16¾*d.* and 18¼*d.*, and *were not affected by the advantageous subsale made [*516] by the plaintiff.

Jones v. *Just* (*o*), in 1868, was an action on a contract of sale of Manilla hemp "expected to arrive." When the hemp had been delivered it was found not to correspond to contract, and after some correspondence the plaintiff, the purchaser, resold it by auction, when in consequence of the rise of prices in the market, it fetched a sum nearly equal to the invoice price. The jury were told that if there had been a breach of the vendor's warranty, the damages

(*m*) *Josling* v. *Irvine*, 6 H. & N. 512; 30 L. J. Ex. 78.
(*n*) *Williams* v. *Reynolds*, 6 B. & S. 495.
(*o*) *Jones* v. *Just*, L. R. 3 Q. B. 197; 37 L. J. Q. B. 89.

would be the difference between what the hemp was worth when it arrived and the market value at that time of such hemp as should have been delivered, thus giving the plaintiffs the benefit of the rise in the market, and this was held by Cockburn, C.J., Mellor and Blackburn, JJ., to have been a proper direction.

In *Ogle* v. *Earl Vane* (*p*), in 1868, the defendant had contracted to deliver iron to the plaintiff in July, but owing to a break down in his furnaces, had been unable to do so. At the defendant's request the plaintiff had refrained from buying in against him until the following February when he bought in at a considerable advance on the contract price, and the measure of damages was held to be the difference between the contract and the February prices (*q*).

In *Brown* v. *Muller* (*r*), in 1872, is a leading case on the measure of damages where the contract was for the delivery of goods by instalments. Here the plaintiff bought of the defendant 500 tons of iron, to be delivered in about equal proportions in September, October, and November, 1871. In August the defendant gave notice that he did not intend to deliver any iron. In December the plaintiff commenced the action, and claimed as damages for non-delivery the difference between the contract and market prices on the 30th of November, which amounted to 237*l.* 10*s.* If the plaintiff had [*517] *bought in at the time when the defendant repudiated the contract the difference would have been 25*l.* If he had bought in one-third of the iron at the end of each of the three months the sum of the differences would have amounted to 109*l.* 4*s.* The Court held that the last was the true measure of damages.

Tyers v. *Rosedale and Ferryhill Iron Co.* (*s*), in 1873, was an action for not delivering under the following circumstances. There were two contracts, each for the delivery of 1,000 tons of iron in monthly quantities over 1871. Early in 1871 the plaintiffs, the purchasers, found it convenient to take the whole of the monthly instalments, and from time to time requested the defendants, the vendors, to postpone delivery, to which the vendors agreed, delivering only portions of the instalments. In September, however, the purchasers began to press for deliveries, and on the 6th of December informed the vendors that the whole of the 2,000 tons must be delivered by the end of that month. The defendants offered to deliver the whole of the December instalment, but refused to deliver any more iron on the ground that the contract was at an end as to the other instalments. In all 907 tons had been delivered by the end of 1871, and the defendants paid into Court sufficient to cover the damages from the short delivery of the December instalment.

(*p*) *Ogle* v. *Earl Vane*, L. R. 2 Q. B. 275; L. R. 3 Q. B. 272; 36 L. J. Q. B. 175; 37 L. J. Q. B. 771.

(*q*) See also *Hickman* v. *Haynes*, L. R. 10 C. P. 598; 44 L. J. C. P. 358.

(*r*) *Brown* v. *Muller*, L. R. 7 Ex. 319; 41 L. J. Ex. 214.

(*s*) *Tyers* v. *Rosedale Co.*, L. R. 8 Ex. 305; L. R. 10 Ex. 195; 42 L. J. Ex. 185; 44 L. J. Ex. 130.

Kelly, C.B., and Piggot, B., were of opinion that a verdict should be entered for the defendant; Martin, B., was of a contrary opinion in which, on the appeal, Cockburn, C.J., Blackburn, Mellor, Lush, Brett, and Lindly, JJ., agreed. Cockburn, C.J., said, "It did not "suit the purchasers to take the iron in the instalments originally "contemplated by the parties, and they proposed to the sellers to "postpone from time to time the delivery of the monthly instal-"ments. Now it would have been perfectly competent to the de-"fendants to say, 'We will not acquiesce in that proposal of yours. "'You are bound to take the iron month by month, and you must so "'take it, *or consider the contract at an end.' Instead of [*518] "doing that the defendant, as I read the letters, acquiesced, not in "holding the contract at an end, but in postponing the period of "delivery. The iron was to be delivered in the course of the year "1871, and there was by reason of this postponement, a very consid-"erable arrear at the end of this year. Then the plaintiffs called on "the defendants to deliver at once the whole of what remained unde-"livered. I think that this was a demand which they were not entitled "to make. I think that the postponement had the effect of carry-"ing the period of delivery over the year 1872, but that the defend-"ants could not be called upon to deliver 1,000 tons of iron at one "time, but only in such quantities as were originally provided for. "Therefore the defendants might have said, 'We shall not deliver "'the whole that remains in one mass, but we will deliver it accord-"'ing to the terms of the contract.' But they did not say this. "What they said was, 'We will not deliver you anything at all.' "There I think they were wrong. Consequently, there was a breach "of the contract, for which the defendants are liable in damages." Blackburn, J., said, if the defendants had said, "'We want a rea-"'sonable time and no more,' I should have been willing to construe "the agreement in that way. But they did not ask for time; they "refused to deliver anything but the monthly quantity."

In *Ex parte Llansamlet Tin Plate Co.*, (*t*) in 1873, one Voss had in May contracted to sell to the Llansamlet Co. 300 tons of iron to be delivered at the rate of 40 tons a month. In some months no iron was delivered and in others not the full amount. The Llansamlet Co. in some cases made purchases to supply the deficiencies, but in January when Voss filed a liquidation petition, there remained undelivered 224 tons. The price had risen and the company claimed to prove for the difference between the contract and market price of 224 tons at the date of filing the petition. There was no evidence that the deliveries had been postponed at the *re- [*519] quest of Voss so as to bring the case within *Ogle* v. *Earl Vane* (*u*), and V.-C. Bacon held, and was affirmed in the Court of Appeal, that the damages were to be calculated as the difference between

(*t*) *Ex parte Llansamlet Tin Plate Co.*, 16, Eq. 155.

(*u*) *Ogle* v. *Earl Vane*, L. R. 2 Q. B. 275; L. R. 3 Q. B. 272; 36 L. J. Q. B. 175; 37 L. J. Q. B. 771.

the market and contract prices of the undelivered amounts at the successive contract dates for delivery, and that where the company had bought in, the damages were the difference between the contract price and the price at which they bought in.

Roper v. *Johnson* (*x*), in 1873, was another case of refusal to deliver; there was a contract for the delivery of 3,000 tons of coal "to be taken during the months of May, June, July, and August." The vendees failed to send for any coals in May, and on the 31st of May the vendor declined to go on with the contract. This action was commenced by the vendees on the 3rd of July to recover damages for non-delivery, and the trial took place in August. The defendant argued that the damages were to be estimated by inquiring upon what terms the plaintiffs could have gone into the market and obtained a similar contract on the day when they elected to treat the contract as at an end, and that it was for the plaintiffs to give evidence of loss so ascertained. But on the motion the Court was of opinion that if the plaintiff had waited until the end of August the case must have followed *Brown* v. *Muller* (*y*).

But said Brett, L.J., "To entitle a plaintiff to recover damages "in action upon a contract, he must show a breach, and that he "has sustained damage by reason of that breach. * * * The gen-"eral rule as to damages for a breach of contract is, that the plain-"tiff is to be compensated for the difference in his position from "what it would have been if the contract had been performed. * * * "Now, although the plaintiff may treat the refusal of the defend-"ant to accept or to deliver the goods, before the day for per-[*520] *"formance as a breach, it by no means follows that the "damages are to be the difference between the contract price and "the market price on the day of the breach. * * * The election "to take advantage of the repudiation of the contract goes only to "the question of breach, and not to the question of damages; and "when you come to estimate the damages, it must be by the differ-"ence between the contract price and the market price at the day "or days appointed for performance, and not at the time of breach. "* * * It seems to me to follow * * * that the plaintiffs here did "all they were bound to do when they proved what was the differ-"ence between the contract price and the market price at the several "days specified for the performance of the contract, and that *prima* "*facie* that is the proper measure of damages; leaving it to the "defendant to show circumstances which would entitle him to a "mitigation, No such circumstances appeared here: there was "nothing to show that the plaintiffs ought to have or could have "gone into the market,—a rising market,—and obtained a similar "contract."

In the following cases there was no market to refer to as a test of

(*x*) *Roper* v. *Johnson*. L. R. 8 C. P. 167; 42 L. J. C. P. 65.
(*y*) *Brown* v. *Muller*, L. R. 7 Ex. 319; 41 L. J. Ex. 214, *ante*, p. 516.

value. They are for convenience taken in the order, first where there was a breach as to quality, and secondly as to time.

In *Lewis* v. *Peake* (*z*), in 1816, a buyer of a horse with a warranty, resold it with the same warranty and was sued by his vendee for breach of the warranty. It was held he could recover the cost of defending that action, from his vendor.

In *Chesterman* v. *Lamb* (*a*), in 1834, the buyer of a horse warranted sound recovered from the vendor the cost of the horse's keep at livery where he had sent it to stand, on discovering its unsoundness, until it could be sold.

In *Ellis* v. *Chinnock* (*b*), in 1835, Coleridge, J., said, "If a per-"son has bought the horse with a warranty, which has *been [*521] "broken, and he tenders the horse to the seller, and the seller re-"fuses to receive it back, the buyer is entitled to keep it a reason-"able time till he can sell it, and for that time he may against the "seller recover the expense of keeping it" (*c*).

In *Mondel* v. *Steel* (*d*), in 1841, the defendant had contracted to build a ship for the plaintiff according to specification, and in a former action in which he had sued the plaintiff for the price of the ship, the plaintiff had successfully pleaded that he was entitled to a reduction of the price by reason that the ship had not been made according to the specification, and the defendant had obtained a verdict for the contract price of the ship, less the amount the plaintiff was entitled to deduct. The plaintiff now sued the defendant for special damages for breach of the defendant's contract to build the ship according to the contract; by reason of her not being so built she had become much strained and had to be repaired, and the plaintiff lost the use of her during the time she was being repaired. The defendant pleaded the former verdict, but the Court held the plea bad, and Parke, B., delivering the judgment of the Court, said, "All the plaintiff could by law be allowed in dimi-"nution of damages, on the former trial, was a deduction from the "agreed price, according to the difference, at the time of the de-"livery, between the ship as she was, and what she ought to have "been according to the contract: but all claim for damages beyond "that, on account of the subsequent necessity for more extensive "repairs, could not have been allowed in the former action, and "may now be recovered" (*e*).

In *Randall* v. *Raper* (*f*), in 1858, the defendant sold barley to the plaintiff, warranting the quality: the plaintff resold it with the

(*z*) *Lewis* v. *Peake*, 7 Taunt. 153.
(*a*) *Chesterman* v. *Lamb*, 2 Ad. & El. 129; *McKenzie* v. *Hancock*, Ry. & M. 436.
(*b*) *Ellis* v. *Chinnock*, 7 C. & P. 169.
(*c*) See also *Clare* v. *Maynard*, 6 Ad. & El. 519; *Cox* v. *Walker*, 2 Ad. & El. 523.
(*d*) *Mondel* v. *Steel*, 8 M. & W. 858; 10 L. J. Ex. 426.
(*e*) See also *Rigge* v. *Burbridge*, in 1846, 15 M. & W. 598; 15 L. J. Ex. 309.
(*f*) *Randall* v. *Raper*, E. B. & E. 84; 27 L. J. Q. B. 266.

[*522] same warranty to persons who sowed it, and had *consequently suffered loss through inferior crops to the extent of 261*l.* 7*s.* 6*d.* They then claimed compensation from him, but no sum had been agreed upon, and no payment made. The plaintiff obtained a verdict for 261*l.*, which was upheld by Lord Campbell, C.J., Wightman, Erle, and Crompton, JJ., on the ground that in assessing the damages the jury ought to include the amount to which they considered the plaintiff had become liable to his vendees.

In *Dingle* v. *Hare* (*g*), in 1859, the plaintiff had purchased from the defendant 20 tons of manure warranted to contain a certain proportion of phosphorus at 5*l.* 5*s.* a ton. The plaintiff resold 10 tons to farmers which turned out bad, making a profit of 30*s.* a ton. Two of these 10 tons he had sold to one Robins, who found them of little value, and the plaintiff paid him 20*l.* as damages. The purchasers of the other eight tons had made no complaints.

Byles, J., in his summing up said, "If the defendant knew "that the plaintiff was a merchant dealing in these articles and "buying for the purpose of selling them again, any loss he might "sustain upon such resale, by reason of their bad quality or of a "breach of warranty, might fairly be said to be a damage which "was in the contemplation of the parties at the time of making the "contract; that, if they (the jury) thought the settlement of "Robins' claim was a fair and reasonable thing, the defendant was "bound to make good the loss; and that as to the eight tons as to "which the purchasers had made no complaint and possibly might "never make any, the plaintiff was not yet entitled to claim compen-"sation, and to recover reasonable damages in respect of their not "being of a fair merchantable quality and according to the war-"ranty."

In *Mullett* v. *Mason* (*h*), in 1866, a cattle dealer sold a cow to the plaintiff, fraudulently warranting it free from infectious disease knowing it to be diseased. The plaintiff placed the cow with five [*523] others, which caught the disease and died, and *it was held that the plaintiff could recover as damages the value of all the cows.

In *Smith* v. *Green* (*i*), in 1875, the defendant sold a cow to a farmer, warranting her to be free from foot-and-mouth disease. The plaintiff, in the ordinary course of his business, placed her among other cows, some of which caught the disease from the cow in question and died. The jury found that there had not been any false representation. On the motion for a new trial the Court, consisting of Lord Coleridge, C.J., Brett and Grove, JJ., held that the jury, in estimating the damages, might take into account the fact that the seller knew, or must be taken to have known, that the cow

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(*g*) *Dingle* v. *Hare*, 7 C. B. N. S. 145; 29 L. J. C. P. 143.
(*h*) *Mullett* v. *Mason*, L. R. 1 C. P. 559; 35 L. J. C. P. 299.
(*i*) *Smith* v. *Green*, L. R. 1 C. P. D. 92; 45 L. J. C. P. 28.

would be placed with other cows, and if so then the loss of the other cows might naturally be expected to happen (*k*).

In *Randall* v. *Newson* (*l*), in 1877, the defendent supplied the plaintiff with a pole for his carriage, which broke in consequence of the horses swerving; the horses and carriage were damaged to the extent of 130*l*. The price of a new pole was 3*l*., and the question was whether the defendant's liability was limited to the 3*l*. At the trial, before Archibald, J., the jury found that the pole was not reasonably fit and proper for the carriage, and that the defendant had not been guilty of any negligence, and on these findings a verdict for the plaintiff for 3*l*. was entered with leave to the defendant to move. On the motion before Blackburn and Lush, JJ., judgment was ordered to be entered for the defendant on the ground that the defect was a latent one, which neither care nor skill could discover. The plaintiff appealed, and the judgment of the Queen's Bench was reversed in the Court of Appeal, consisting of Kelly, C.B., Mellish, L. J., Brett and Amphlett, JJ.A. It was held that the question, which should have been left to the jury, was whether the injury to the *horses was or was not a natural consequence of the [*524] defect in the pole. The Court held that the damages suffered by the breach were the loss of the pole itself and the damages, which were the natural consequence of the pole breaking.

In *Thol* v. *Henderson* (*m*), in 1881, the defendants, who sold the goods to the plaintiff, paid into Court an amount which it was admitted was sufficient, provided the plaintiff could not recover in respect of his loss of profit on the sub-sale. Grove, J., held that he was not entitled to do so (*n*).

In the following cases there was a breach as to time, and there was no market price to refer to. When the contract was to deliver goods at a certain date and that date is passed, the vendee may accept the goods and bring his action for any damages he may have actually suffered in consequence of the late delivery. He does not, by accepting a late delivery, waive any claim he may have for damages arising from the delay. Just as where, by accepting goods which were not up to the warranted quality, he does not waive his right to damages for breach of warranty.

In *Fletcher* v. *Tayleur* (*o*), in 1855, where the action was to recover damages for the loss of profits by reason of the late delivery of a ship, Willes, J., suggested that the measure of damages might be the average profit made by the use of it.

In *Portman* v. *Middleton* (*p*), in 1858, the plaintiff had contracted

(*k*) [This direction was approved of subsequently in *Randall* v. *Newson*, in the Queen's Bench, 2 Q. B. D. 111. See also *Mullett* v. *Mason*, L. R. 1 C. P. 559; 35 L. J. C. P. 299.]

(*l*) *Randall* v. *Newson*, 2 Q. B. D. 102; 45 L. J. Q. B. 364; 46 L. J. Q. B. 257.

(*m*) *Thol Henderson*, 8 Q. B. D. 457.

(*n*) See also *Heilbutt* v. *Hickson*, L. R. 7 C. P. 455; 41 L. J. C. P. 228.

(*o*) *Fletcher* v. *Tayleur*, 17 C. B. 21; 25 L. J. C. P. 65.

(*p*) *Portman* v. *Middleton*, 4 C. B. N. S. 322; 27 L. J. C. P. 231.

to repair a threshing engine for one Sheaf by the beginning of August. He then sub-contracted with the defendant to make a new fire-box for the engine, and paid the defendant 12*l.* in advance, but said nothing about his contract with Sheaf. In consequence of the defendant's delay the plaintiff was obliged to purchase a fire-box from another person, and was unable to deliver the engine to Sheaf [*525] until November. Having settled Sheaf's claim for *20*l.* the plaintiff now sought to recover this sum and a sum of 8*l.* for extra expenses incurred, together with the sum of 12*l.* paid in advance. There was no question as to the two latter sums, but the Court held that he was not entitled to recover the 20*l.*, as such damages did not come within the rule in *Hadley* v. *Baxendale* (*q*), either as the ordinary result of the breach, or contemplated as the probable result in the special circumstances known.

(*q*) *Hadley v. Baxendale*, 9 Ex. 341; 23 L. J. Ex. 179, *ante*, p. 508.

Smeed v. *Foord* (*r*), in 1859, was an action by a farmer for damages for late delivery of a threshing machine, which the defendant had contracted to deliver within three weeks. The defendant knew that it was the plaintiff's custom to thresh the corn in the field and send it direct to the market. As it was not delivered in time, the plaintiff tried to hire a machine and, being unsuccessful, was compelled to carry the corn home and stack it, and while so stacked it was damaged by rain, and had to be kiln-dried after threshing, and when sold it brought a less price than it would have done had it been sold at the time it would have been if the machine had been punctually delivered. The market price also had gone down. It was held that the plaintiff was entitled to substantial damages in respect of the expense of stacking the corn, the deterioration and expense of drying, but not of the fall of the market.

Brady v. *Oastler* (*s*), in 1864, is an authority to show that the motives which induced the plaintiff to enter into a contract, have no bearing on the question of damages. The defendants delivered certain knapsack-straps late, and paid into Court a sum sufficient to cover any expense which the plaintiff had been put to in completing the contract. The goods had all been paid for at the rate of 3*s.* 9*d.* a set, and for the purpose of enhancing the damages, the plaintiff tendered evidence to show that 11*d.* out of the 3*s.* 9*d.* had been paid in consideration of the defendant's promise to [*526] *supply the goods within the short time mentioned in the contract. The evidence was held by Pollock, C.B., Bramwell and Channell, B.B., to have been properly rejected, Martin, B., dissenting.

In the case of *Borries* v. *Hutchinson* (*t*), in 1865, the defendants contracted to deliver 75 tons of caustic soda to the plaintiffs for shipment from Hull for the continent, in equal quantities, in June,

(*r*) *Smeed* v. *Foord*, 1 E. & E. 602; 28 L. J. Q. B. 178.
(*s*) *Brady* v. *Oastler*, 3 H. & C. 112; 33 L. J. Ex. 300.
(*t*) *Borries* v. *Hutchinson*, 18 C. B. N. S. 445; 34 L. J. C. P. 169.

July, and August. The plaintiffs had made a contract with one Heitmann to supply him at St. Petersburg with the above quantities of soda, to be shipped to him at the above times. The defendant delivered 26 tons in September, and in consequence of the lateness of the season the rates for freight and insurance to St. Petersburg were higher than at the end of August. It was admitted that caustic soda was not kept in stock so as to be purchasable at any time in the market and therefore had no market value. Heitmann had resold the soda to one Heinburger. The plaintiffs claimed, as damages, the increased freight and charges, the loss of their profits on resale of the undelivered portion, and a sum of 159*l.*, made up partly of the profits which Heitmann would have made by his subsale to Heinburger, and partly of a sum (which the plaintiffs had repaid Heitmann), paid by Heitmann to Heinburger by way of compensation for the non-delivery. It was held that the plaintiffs could recover the increased freight and insurance, and also the loss of their profits on the undelivered portion, but not the 159*l.* Erle, C.J., said: "Here, the vendor had notice that the vendee was buying the "caustic soda,—an article not ordinarily procurable in the mar-"ket,—for the purpose of resale to a sub-vendee on the continent. "He made the contract, therefore, with knowledge that the buyers "were buying for the purpose of fulfilling a contract which they "had made with a merchant abroad. If the plaintiffs could have "delivered the caustic soda, which the defendant failed to supply, "to their vendee Heitmann, their profit thereon would have been "52*l.* 5*s.* 4*d.* *That sum the defendant has paid into [*527] "Court: and we may assume that the plaintiffs are entitled to re-"cover as damages for the defendant's breach the loss of the profit "which the plaintiffs would have derived from the transaction if "the defendant had delivered the caustic soda pursuant to his con-"tract * * * The plaintiffs further claimed damages by rea-"son of their having been called upon to reimburse Heitmann, "their vendee, to the extent of 159*l.*, which Heitmann had paid to "Heinburger, a manufacturer to whom he had contracted to sell "the soda, to compensate him for the breach of his contract with "him. It appears to me that that claim is too remote. The de-"fendant had notice at the time of entering into the contract with "the plaintiffs that they had contracted with one purchaser on the "continent. For the damages resulting from that, it is agreed that "he is responsible. But he had no notice of the subsequnt resale: "and it is not to be assumed that the parties contemplated that he "was to be held responsible for the failure of any number of sub-"sales. These could not in any sense be considered as the direct, "natural, or necessary consequence of a breach of the contract he "was entering into." Willes, J., said: "Here the purchasers en-"tered into a contract to sell to Heitmann, trusting to the perform-"ance of his contract by the defendant, to enable them to perform "theirs. The defendant had notice of this contract; and I see no

"injustice in holding him to be liable to that extent. Heitmann "chose to take upon himself a similar risk, and to contract for the "sale of the soda to Heinburger. Even if the defendant had no-"tice of this second contract at the time he sold to Heitmann, I "think the damages arising from the non-delivery by Heitmann to "Heinburger were too remote. In ordinary cases, where the arti-"cle is one which can be bought in the market, the proper measure "of damages for breach of a contract to deliver is the difference "between the contract price and the market price on the day of the "breach * * * there was no market price to which resort "could be had as a test of damage. We must, therefore, ascertain [*528] "what was *the value of the article contracted for at the "time it ought to have been and at the time when it actually was "delivered. Now, the value of such an article as this depends "upon the existence of facilities for its transport to the place for "which it is destined. If the caustic soda had been forwarded to "Hull at the times contracted for, it was capable of being sent to "St. Petersburg. When it was delivered, it was also capable of "being sent to St. Petersburg, but only at a greater cost for freight "and insurance than would have been incurred if it had been de-"livered in due course at Hull. It necessarily follows, therefore, "that the soda was worth less when it was delivered, by the differ-"ence between the cost of forwarding it at that time to St. Peters-"burg and what the cost would have been if delivered at the "times mentioned in the contract. The plaintiffs are clearly enti-"tled to recover that as the direct and natural consequence of the "defendant's breach of contract."

In the case of *Cory* v. *The Thames Iron-works and Ship-building Co., Limited* (*u*), in 1868, the defendants, who were ship-builders, having had a large vessel, called a derrick, thrown on their hands, in consequence of the purchaser's insolvency, agreed to sell it to the plaintiffs, and to deliver it on the 1st of January following, but were unable to do so until July. The vessel was the first of the kind ever built in this country, and the use to which the plaintiffs intended to put her was quite novel. The most obvious use to which she could be applied was as a hulk for storing coals, and the defendants, at the time of entering into the agreement, believed that the derrick was to be so used. If she had been intended for that purpose, the plaintiffs would have suffered damage to the extent of 420*l.* But the plaintiffs wanted her for a special purpose, and had purchased machinery and two steam-tugs to use with her, which were comparatively useless in consequence of the unpunctual delivery. The plaintiffs also lost large profits which they would have made by the special use. It was admitted, as to all damages except [*529] the *420*l.*, that the plaintiffs were not, according to *Hadley* v. *Baxendale* (*x*), entitled to recover them, the defendants not hav-

(*u*) *Cory* v. *Thames Iron-works*, L. R. 3 Q. B. 181; 37 L. J. Q. B. 68.
(*x*) *Hadley* v. *Baxendale*, 9 Ex. 341; 23 L. J. Ex. 179.

ing known the special purpose for which the derrick was bought. The defendants contended that the plaintiffs were not entitled to the 420*l.*, inasmuch as they had never contemplated using the derrick as a coal store, and could not, therefore, have suffered damage by being unable so to use her; and that, as the derrick was an entirely novel construction, any use she could be put to was novel, and therefore the loss neither arose according to the usual course of things, nor was such as both parties contemplated as the probable result of a breach. The Court, consisting of Cockburn, C.J., Blackburn and Mellor, JJ., held that the plaintiffs were entitled to recover the 420*l.* Blackburn, J., in his judgment, said that "argument would "come to this, that the damages could never be anything but what "both parties contemplated; and where the buyer intended to ap-"ply the thing to a purpose which would make the damages "greater, and did not intend to apply it to the purpose which the "seller supposed he intended to apply it, the consequence would "be to set the defendant free altogether. That would not be just, "and I do not think that was at all meant to be expressed in *Had-"ley* v. *Baxendale* (*x*). Here the arbitrator has found that what "the defendants supposed (when they were agreeing to furnish the "derrick) was, that it was to be employed in the most obvious man-"ner to earn money, which the arbitrator assesses at 420*l.* during "the six months' delay; and, as I believe the natural consequence "of not delivering the derrick was that that sum was lost, I think "the plaintiffs should recover to that extent."

In the case of *France* v. *Gaudet* (*y*), in 1871, the facts were these. A Captain Hodder, whose ship was about to sail, agreed with the plaintiff to buy from him 100 cases of champagne at 24*s.* a dozen. The plaintiff then purchased from a broker named Restall, and obtained from him the delivery warrants for 100 cases of champagne of the quality he had *sold to Hodder, at 14*s.* a [*530] dozen, then lying at the defendants' wharf. The defendants refused to deliver the wine. Wine of that quality could not be procured in the market in time to supply Hodder, and the Court, consisting of Mellor, Lush, and Hannen, JJ., held that the plaintiff was entitled to recover as damages the difference between 14*s.* and 24*s.*, on the general rule that a plaintiff is entitled to the difference between the contract price and the value of the goods at the time for delivery, that that value could not here be ascertained in the market, but that a *bonâ fide* sale having taken place, the champagne had acquired an actual value of 24*s.* per dozen.

In the case of *Hinde* v. *Liddell* (*z*), in 1875, the defendants contracted for the sale to the plaintiff of 2,000 grey shirtings, "delivery, October 20th, certain." The defendants had to get the shirtings made according to sample, and on the 15th of October informed

(*x*) *Hadley* v. *Baxendale*, 9 Ex. 341; 23 L. J. Ex. 179.
(*y*) *France* v. *Gaudet*, L. R. 6 Q. B. 199; 40 L. J. Q. B. 121.
(*z*) *Hinde* v. *Liddell*, L. R. 10 Q. B. 265; 44 L. J. Q. B. 105.

the plaintiff that they could not execute the order by the time specified. The plaintiff at once tried to purchase other shirtings like those ordered, and being unable to do so, bought shirtings better in quality, but as nearly the same as those contracted for, as he was able, at a slightly advanced price, and these he delivered to his vendee at the contract price. The price paid by the plaintiff was 137*l.* 10*s.* more than he had contracted to pay the defendants; and the goods so purchased were found to be 87*l.* 10*s.* better than those contracted for. The defendants contended that the plaintiff was only entitled to recover the difference. Blackburn, J., said:—"There was no market for this particular description of shirtings, "and therefore no market price: in such a case, the measure of "damages is the value of the thing at the time of the breach of con-"tract, and that must be the price of the best substitute procur-"able." And the Court held that the plaintiff was entitled to recover 137*l.* 10*s.*

In *Bergheim* v. *The Blaenavon Iron Co.* (*a*), in 1875, the [*531] *action was to recover damages from the vendor for late delivery. The contract was for 5,000 tons of rails, the delivery to commence by the 15th of January, and to be completed by the 15th of May. "In the event of the makers exceeding the time for delivery above stipulated, they shall pay, by way of fine, the sum of 7*s.* 6*d.* per ton per week." The defendants delivered the iron in May, June, July, August, and September, and the Court held that the fine ought to be calculated from the time at which the contract ought to have been completed, viz., the 15th of May.

In *The Elbinger Actien-Gesellschafft* v. *Armstrong* (*b*), in 1875, the defendant had contracted to deliver 666 sets of wheels and axles, for shipment from Hull; the first 100 sets were to be delivered by the 15th of April, and were not so delivered. The plaintiffs, before entering into the contract, had informed the defendant that the wheels were for delivery to a Russian company, under penalties. The plaintiffs were unable to procure other sets of wheels, and paid the Russian company one rouble for each day's delay of each set of wheels, amounting to 100*l.* 13*s.* No question was left to the jury, but the Judges directed a verdict for this amount to be entered for the plaintiffs. Blackburn, J., delivering the judgment of the Court, said: "If we thought that this amount could only be come at by laying down "as a proposition of law that the plaintiffs were entitled to recover the "penalties actually paid to the Russian company, we should pause "before we allowed the verdict to stand. * * * If the Judge "had told the jury expressly that the penalties as such could not be "recovered, but that the plaintiffs were entitled to such damage as "in their opinion would be fair compensation for the loss which

(*a*) *Bergheim* v. *The Blaenavon Iron Co.*, L. R. 10 Q. B. 319; 44 L. J. Q. B. 92.
(*b*) *Elbinger Actien-Gesellschafft* v. *Armstrong*, L. R. 9 Q. B. 473; 43 L. J. Q. B. 211. See also *Grébert-Borgnis* v. *Nugent*, 15 Q. B. D. 85.

"would naturally arise from the delay, including therein the proba-
"ble liability of the plaintiffs to damages by reason of the breach
"through the defendant's default of that contract to which, as both
"parties knew, the defendant's contract with the plaintiffs
"*was subsidiary, the direction would not, at all events, have [*532]
"been too unfavourable to the defendant."

In the case of the *Hydraulic Engineering Co.* v. *McHaffie* (*c*), in 1878, the plaintiffs, who contracted to supply a "gun-powder pile driver" to Justice, sub-contracted with the defendants to make a part of the machine, telling them that the machine was to be delivered to Justice by the end of August, and it was agreed in the sub-contract, which was made about the end of July, that the defendants were to finish that part "as soon as possible" (*d*). The defendants did not deliver the part until the end of September, when Justice refused to accept the machine, and as it was unsaleable, it was of no value except as old iron, and it was agreed that the defendants should take it. The defendants' only excuse for the delay was that they had not in their employ a workman competent to do the work. Field, J., held that the plaintiffs were entitled to recover for the expenditure they had uselessly incurred, and for the loss of profit upon their contract with Justice, and this judgment was affirmed by Bramwell, Brett, and Cotton, L.JJ.

Interest.

The remaining question is, whether, when one party does not pay a debt owing to another, the other can recover interest on the money so detained, or damages for its detention: as where the vendee refuses to pay for goods which have been delivered to him. There were many cases on this subject in the early part of the century, not always in harmony, and the law is not quite free from ambiguity at the present date; but the general rule is now quite settled in accordance with the *dictum* of Abbott, C. J., in the case of *Higgins* v. *Sargent* (*e*), in 1823. "It is now established as a general principle, "that interest is allowed by law only upon mercantile securities, "or in those cases where there has been an express promise *"to pay interest, or where such promise is to be implied [*533]
"from the usage of trade or other circumstances."

Although it is here stated that interest is recoverable on mercantile securities, it is probably more exact to say that where interest has not been expressly contracted for on the face of the instrument, it is not recovered as such, but as damages for the detention of the debt, to which, on mercantile securities, the plaintiff is generally en-

(*c*) *Hydraulic Engineering Co.* v. *McHaffie*, 4 Q. B. D. 670.
(*d*) For the meaning of these words, see *Attwood* v. *Emery*, 1 C. B. N. S. 110; 26 L. J. C. P. 73.
(*e*) *Higgins* v. *Sargent*, 2 B. & C. 348.

titled by the usage of trade, but at the discretion of the jury (*f*). And if the defendant undertook to give his acceptance, and then refused to do so, the plaintiff is entitled as if the acceptance had been given (*g*).

There is no difficulty where the promise to pay interest is an express one, as in *Harrison* v. *Allen* (*h*), in 1824, where the defendant had jewellery sent to him, on the understanding that if he did not return it within twelve months he should pay a certain price for it, with interest. The jury gave interest, and the Court refused to disturb the verdict.

In the case of *Johnson* v. *Bland* (*i*) in 1760, and *Parker* v. *Hutchinson* (*k*), in 1796, the Court probably considered there was an implied contract to pay interest.

The general rule is that the plaintiff is not entitled to pay interest; and from the following cases it will be seen that there is no implied promise to pay interest where there has been a sale of goods, money lent, or a balance of an account struck, nor does it make any difference that the debt was a sum certain payable on a given day (*l*), or that the sale was on credit, or that the plaintiff had demanded the money.

[*534] Thus in *Chalie* v. *Duke of York* (*m*), in 1806, the plaintiff, in the course of dealings with the defendant, had supplied him with wine. In 1880 the account showed a balance in favour of the plaintiff, on which he claimed interest, but Lord Ellenborough, C.J., refused it.

In *Haviland* v. *Bowerbank* (*n*), in 1807, Lord Ellenborough again refused to allow interest on certain sums of money belonging to the plaintiff in the defendant's hands, which the plaintiff had demanded two years before the action.

In *Gordon* v. *Swan* (*o*), in 1810, the contract was for the sale of 150 tons of copper at 84*l.* a ton, "payable at six months," the question was whether interest could be recovered from the expiration of the six months. It was argued for the plaintiff that the fixing of a particular day for the payment for the goods, showed an intention

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(*f*) *Cameron* v. *Smith*, in 1819, 2 B. & A. 305; *In re Burgess*, in 1818, 8 Taunt. 660; *Keene* v. *Keene*, in 1857, 3 C. B. N. S. 145; 27 L. J. C. P. 28. For interest on a mortgage deed, see *In re Roberts* 14 Ch. D. 49.

(*g*) *Slack* v. *Lowell*, in 1810, 3 Taunt. 157; *Porter* v. *Palsgrave*, 2 Camp. 472; *Attwood* v. *Taylor*, in 1840, 1 M. & Gr. 280; *Marshall* v. *Poole*, 13 East, 98; *Davis* v. *Smith*, 8 M. & W. 399.

(*h*) *Harrison* v. *Allen*, 4 Bing. 4.

(*i*) *Johnson* v. *Bland*, 2 Bur. 1086.

(*k*) *Parker* v. *Hutchinson*, 3 Ves. 133; *Mountford* v. *Willes*, 2 B. & P. 387; *Arnott* v. *Redfern*, 3 Bing. 360.

(*l*) *Per* Holroyd, J., in *Higgins* v. *Sargent*, 2 B. & C. 352; *Cook* v. *Wood*, L. R. 7 E. & I. Ap. 27.

(*m*) *Chalie* v. *Duke of York*, 6 Esp. 45.

(*n*) *Haviland* v. *Bowerbank*, 1 Camp. 50; *Bernales* v. *Fuller*, in 1810, 2 Camp. 426.

(*o*) *Gordon* v. *Swan*, 2 Camp. 429; 12 East, 419.

to pay interest from that date. But the Court, one of whom was Lord Ellenborough, C.J., refused to allow it.

The credit is for the benefit of the purchaser, it is an agreement between the parties that until the expiration of the credit, the purchaser shall not be sued for the money. It is not a promise by implication to pay interest from the expiration of the credit.

The case of *Calton* v. *Bragg* (*p*), in 1812, has been often cited as an authority. At the trial it appeared that there was a running account between the plaintiff and defendant, and that the plaintiff had from time to time supplied the defendant with goods, and lent him sums of money. The defendant had paid for the goods and repaid the sums lent, but refused to pay the interest, for which this action was brought. Lord Ellenborough, C.J., Grose and Bayley, JJ., held it could not be recovered. It was contended on the plaintiff's behalf that interest should be paid, because the lender would otherwise lose the benefit which he might have *derived [*535] from the use of his capital, and that the lender ought in equity to be put in the same situation as if he had applied his principal to his own use. Grose, J., said: "It is the lender's own fault if he "do not contract for interest when he advances the money" (*q*).

In the year 1833 an Act, 3 & 4 Will. 4, c. 42, was passed, enacting by s. 28, "that upon all debts or sums certain, payable at a "certain time or otherwise, the jury on the trial of any issue, or on "any inquisition of damages, may, if they shall think fit, allow in-"terest to the creditor, at a rate not exceeding the current rate of "interest, from the time when such debt or sums certain were pay-"able, if such debts or sums be payable by virtue of some written "instrument at a certain time, or if payable otherwise, then from "the time when demand of payment shall have been made in writ-"ing, so as such demand shall give notice to the debtor that inter-"est will be claimed from the date of such demand, until the term "of payment. Provided that interest shall be payable in all cases "in which it is now payable by law."

There appear to be very few reported cases on this section. In *Taylor* v. *Holt* (*r*), in 1864, the defendant wrote to the plaintiff, "Could you do me the favour to lend me 10*l.* until Monday." The plaintiff never gave any notice that he should claim interest; and the Court held that this was not a debt "payable by virtue of some written instrument at a certain time." It seems clear that such a request, although it forms part of the contract for the loan, when read by itself apart from what took place afterwards, does not make the debt payable at a certain time. The offer, for any thing ap-

(*p*) *Calton* v. *Bragg*, 15 East, 223.

(*q*) *Higgins* v. *Sargent*, in 1823, 2 B. & C. 348; *Shaw* v. *Picton*, in 1825, 4 B. & C. 723; *Page* v. *Newman*, in 1829, 9 B. & C. 378; *Foster* v. *Western*, in 1830, 6 Bing. 709; *Fruhling* v. *Schroder*, *in* 1835, 2 Scott, 144; *Rhodes* v. *Rhodes*, in 1860, 29 L. J. Ch. 418.

(*r*) *Taylor* v. *Holt*, 34 L. J. Ex. 1; 3 H. & C. 454, n.

pearing on the face of it, might or might not have been accepted with a modification as to time: as Bramwell, B., put it, it "was not "a written intrument which sets forth an obligation to pay at a cer-"tain time."

[*536] **Geake* v. *Ross* (*s*), in 1875, was an action for goods sold and delivered. The plaintiff had supplied coal to the Treweatha Mine Co., and had written to the defendant, the secretary, "I must now give you notice that if my account with this mine be not settled on or before the 1st day of November next, I shall instruct my solicitor to take the necessary proceeding to recover the money this company owes me;" and this was held by Lord Coleridge, C. J., and Grove, J., to be a sufficient demand, and notice that interest would be claimed (*t*).

In *Duncombe* v. *Brighton Club Co.* (*u*), in 1875, the plaintiff supplied furniture for the defendant's hotel on the terms "one third in cash, and bills at six and twelve months for the balance." The defendant failed to pay the whole of the third in cash on delivery, but paid the unpaid part later on, and the question was whether the plaintiff was entitled to interest on the unpaid part. The judges differed as to the meaning of the words of the section "payable by virtue of some written instrument at a certain time." Mellor and Lush, JJ., being of opinion that the section does not require that the actual day should be ascertained upon the face of the instrument, but that it was sufficient if the basis of the calculation by which it could be made certain was to be found in the instrument. Blackburn, J., took a different view, but said, whatever the law is, in fairness "wherever there is a debt at all it should bear interest, "unless there is some strong reason to the contrary" (*x*)].

(*s*) *Geake* v. *Ross*, 44 L. J. C. P. 315.

(*t*) See also *Hill* v. *South Staffordshire Ry. Co.*, in 1874, L. R. 18 Ex. 154; 43 L. J. Ch. 556; and *Ward* v. *Eyre*, in 1880, 15 Ch. D. 130, as to what is a "demand," and a "debt or sum certain payable," Jessel, M. R., saying that a demand for the balance of an account, is not a demand for a "debt or sum certain payable."

(*u*) *Duncombe* v. *Brighton Club Co.*, L. R. 10 Q. B. 371; 44 L. J. Q. B. 216.

(*x*) See also Lord Cairns' remarks in *Rodger* v. *Comptoir d'Escompte de Paris*, L. R. 3 P. C. C. 475; 38 L. J. P. C. 30; and 1 & 2 Vict. c. 110, s. 17, for interest on judgment debts.

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